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IN THE
Supreme Court of the United States
OCTOBER TERM, 1999

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE; AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; KATHY LIBICKI; AND EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF *CERTIORARI*

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

September 1999

9288

QUESTIONS PRESENTED

I. Do public employees possess standing to challenge, as void as against Federal constitutional law and public policy, the legality of one of the terms of the collective bargaining agreement governing their terms and conditions of employment, in an action under 42 U.S.C. § 1983 (West Supp. 1999)?

II. Is a collective bargaining agreement indemnifying a public employer from liability arising from its enforcement of a forced-unionism agreement absent compliance with "the constitutional requirements for the ... collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), void as against Federal constitutional law and public policy?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings in the court whose judgment is sought to be reviewed other than the parties named in the caption.

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No. 99-_____

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL L. JONES;
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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

Petitioners Steven Prescott, Robert F. Berry, Cheryl L. Jones, Karen Pierce, and Christine M. Turney respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on 12 May 1999.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A, *infra*, 1a) is reported at 177 F.3d 1102. The judgment of the United

States District Court for the Eastern District of California (App. B, *infra*, 20a) is unreported. The opinion and order of the United States District Court for the Eastern District of California on Petitioners' and Respondents' Cross-Motions for Summary Judgment (App. C, *infra*, 21a) is unreported. The court of appeals' unreported order denying the Petition for Rehearing and Suggestion of Rehearing *En Banc* appears in App. D, *infra*, 37a.

JURISDICTION

The court of appeals entered its judgment on 12 May 1999. Petitioners' timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 25 June 1999 (App. D, *infra*, 37a). The time for petitioning for a writ of *certiorari* runs from the latter date. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, and the First and Fourteenth Amendments, of the United States Constitution, Title I of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (West Supp. 1999), and § 3502.5(a) of the California Government Code. Their pertinent text is set out in Appendices E-I, *infra*, 38a-42a.

STATEMENT OF THE CASE

This case involves: (1) the standing of public employees to challenge provisions of the collective bargaining agreement ("CBA") governing their terms and conditions of employment; and (2) whether a public employer may enter into and enforce an indemnification agreement that contracts away its liability, including even the costs of its own defense, when it enforces the agency shop scheme without complying with "the constitutional requirements for the Union's collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

This is a civil rights action pursuant to 42 U.S.C. § 1983 (West Supp. 1999), seeking declaratory and other relief to prevent and redress the deprivation under color of California law of Petitioners' rights, privileges, and immunities under the United States Constitution. Petitioners Steven Prescott, *et al.* ("the employees"), contend that the district court had jurisdiction under 42 U.S.C. § 1983 over all of their claims, including the allegation that the indemnification provisions of the CBA between Respondents County of El Dorado ("County") and El Dorado County Employees Association, Local No. 1 ("EDCEA") are void as against public policy and unenforceable (Record ("R.") 1, Complaint, ¶¶ 14 and 31, and Exhibit A, Article 4, § 3(J)), under 28 U.S.C. § 1331. The district court and court of appeals decided most of the employees' civil rights claims and entered judgment largely in their favor, but not on the claim presented in this Petition. *See* App. A at 5a-13a, 177 F.3d at 1106-11; App. C at 23a-33a, 35a.[1]

I. The Facts.

Petitioners are five individuals employed by the County in a bargaining unit for which the collective bargaining representative is EDCEA. EDCEA is a "recognized employee organization" and the County is a "public agency" within the meaning of California's Meyers-Milias-Brown Act, Cal. Gov't Code § 3501(b) & (c). The employees are not union members, and were not members when

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[1] The lower courts also rejected the employees' request for restitution of fees illegally seized in the absence of compliance with *Hudson*'s requirements. *See* App. A at 11a-12a, 177 F.3d at 1109-10; App. C at 35a. Because Respondents have agreed to refund all fees illegally seized from the employees in lieu of a trial as to the properly chargeable fee, *id.* at 11a-12a, 177 F.3d at 1111, that issue is moot, and is not raised in this Petition.

"agency fees" were seized from their pay. App. A at 2a-3a. EDCEA is affiliated with Public Employees Union, Local No. 1. App. A at 2a.

Pursuant to the Meyers-Milias-Brown Act, Cal. Gov't Code § 3502.5(a), EDCEA and the County executed a Memorandum of Understanding ("MOU"), or CBA, which included a "UNION RIGHTS" article. Within that article was a section entitled "Fair Share," by which the County agreed to deduct for the benefit of EDCEA agency fees from the wages of all bargaining unit employees who failed or refused to join EDCEA as voluntary members. *Id.*

Concerned that it might be sued by nonunion employees for violation of their constitutional rights, the County, as part of the "Fair Share" section of the "UNION RIGHTS" article, included an indemnification provision, providing as follows:

> Local 1 shall defend, indemnify and hold harmless, release and save the County and its agents and employees against any and all claims, demands, suits, orders, judgements or other forms of liability that shall arise out of or by reason of, action taken or not taken by the County under this Agreement. This includes but is not limited to the collection and procedures for collection of fair share fees and reasonable cost of County's attorney fees and costs along with reasonable cost of management preparations time as well.

R. 1, Complaint, Exhibit A, Article 4, § 3(J).

Beginning on 12 May 1995, the County seized initiation fees and agency fees from each employee's bi-weekly salary, and forwarded the fees to EDCEA's affiliate, PEU. However, Respondents failed to comply with all of the procedural protections required by this Court's decision in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), before these fee seizures began. *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1091-92 (E.D. Cal. 1996). Respondents County and Kathy Libicki (the County's Director of Human Resources) took no steps whatsoever to comply with *Hudson*'s requirements, relying wholly upon EDCEA's representations that it had complied with *Hudson*'s requirements. The County and Libicki undertook no independent review to confirm that EDCEA had done so prior to seizing agency fees from the employees. R. 23, Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, Exhibit 3, page 2, Admission No. 3.

II. Proceedings Below.

The employees filed their Complaint against the County, Libicki, and EDCEA (collectively, "Respondents") in October 1995. They sought a declaratory judgment; injunctive relief; nominal, punitive, and compensatory damages; and costs and attorneys' fees, on the grounds that Respondents were enforcing the County/EDCEA "agency shop" scheme in violation of *Hudson*, and that the indemnification provision of their MOU is void as against public policy, invalid, and unenforceable. Simultaneously, the employees successfully sought a preliminary injunction to stop all fee seizures, based upon the deficiencies of EDCEA's notice and procedures. R. 6, Plaintiffs' Motion for a Preliminary Injunction; 915 F. Supp. at 1092.

After conducting limited discovery, the parties filed cross-motions for summary judgment, and EDCEA filed a motion to dissolve the preliminary injunction. R. 20, Plaintiffs' Motion for Summary Judgment; R. 32, Defendants' Motion for Summary Judgment; R. 35, Defendants' Motion to Dissolve or Modify the Preliminary Injunction. The district court then entered its order on 26 January 1998, App. C at 21a-36a, and judgment in accord with that order on 1 April 1998. App. B at 20a.

The employees, *inter alia*, had sought a final declaratory judgment that the indemnification provision of the County/EDCEA MOU was void as against public policy and unenforceable. The district court denied this claim in its entirety. While Respondents had addressed the merits of the employees' argument in their Opposition to Plaintiffs' Motion for Summary Judgment (R. 31), and had attacked the employees' claim on the merits in their own Motion for Summary Judgment (R. 32), the Record in the district court is **absolutely devoid** of argument on the issue of the employees' standing to raise this element of their claim! Not once did Respondents suggest that the employees lacked standing to challenge the indemnification clause, and the district court likewise asked not a single question about the employees' standing at hearing on the pending motions. R. 51, Hearing Transcript, 15 November 1996. In fact, the indemnification provision was not even discussed at those proceedings.

In its summary judgment decision, the district court *sua sponte* raised the standing issue for the first time, finding that the employees lacked standing to challenge this term of the CBA governing their terms and conditions of employment. App. C at 33a-34a. Specifically, the district court found that the employees had "not demonstrated any of the three prerequisites to standing," reasoning that the employees' injury "is the result of the Union's [*sic*] conduct, and is traceable to the hold harmless agreement in only the most indirect fashion." App. C at 34a. Therefore, the district court entered judgment for Respondents on this element of the employees' claim. *Id.*

The employees timely appealed, R. 54, Notice of Appeal, seeking, *inter alia*, reversal of the district court's *sua sponte* determination that they lacked standing to challenge a term of the CBA governing their terms and conditions of employment. Specifically, they attacked the district court's ruling that the employees lacked "standing to object to the provision which required EDCEA to indemnify the County from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims." App. A at 15a; 177 F.3d at 1111.

Unlike the district court, the court of appeals' panel acknowledged "that [the employees] suffered some injury when the fees were deducted from [their] paycheck[s]." App. A at 16a, 177 F.3d at 1112; *compare* App. C at 34a (identifying injury as failure to comply with *Hudson*'s standards and finding that to be the result of the union's conduct). However, it otherwise affirmed the district court's standing ruling in all of its particulars. App. A at 16a-18a; 177 F.3d at 1112. Notwithstanding that the indemnification provision appears within the "Fair Share" section of the "UNION RIGHTS" article and contains specific language applying it to the County's enforcement of the forced-unionism provisions, the panel declared that Prescott:

> cannot show any connection between the indemnification agreement and [his] injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for Prescott's claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

App. A at 16a; 177 F.3d at 1112. In short, both the district court and the panel discerned no nexus between the indemnification provision and the County's decision to seize fees from the employees.

However, the panel then "switched gears," suggesting—like the district court, App. C at 34a—that the employees' injury was not in the illegal seizure of fees in the absence of compliance with *Hudson*, but because "fee deduction procedures were [not] properly followed." The panel said:

> Speaking of speculation, it can hardly be said that our striking down of the provision would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were. As EDCEA points out, someone—the union—already has that incentive in a powerful form. A failure to perform its duties properly "may result in its being unable to retain a portion of the fair share fee."

> *Hohe* [*v. Casey*], 956 F.2d [399] at 412 [(3d Cir. 1992)].[7] A failure to comply may also involve the union in substantial and expensive litigation, witness this case which has been in progress for over three years and will not be over for some time yet. Moreover, Prescott can suffer no ultimate damage to his interests because nothing in the indemnification agreement will prevent him from collecting any costs, expenses or losses imposed upon him by reason of the defective procedure.
>
> In short, it simply cannot be said that any injury suffered by Prescott is fairly traceable to the agreement, nor is the claim that our striking of the agreement would redress or prevent the injuries that he has suffered anything but speculative.
>
> ---
>
> [7] It should be noted that in *Hohe* the court suggested that there was standing, but did not decide the issue. *Id.* at 411.

App. A at 16a-17a; 177 F.3d at 1112 & n.7.[2]

A timely Petition for Rehearing and Suggestion of Rehearing *En Banc* was denied on 25 June 1999. App. D at 37a.

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[2] The panel's description of this incentive as "powerful" is somewhat curious, since it was denying to the union only the nonchargeable portion of the fee, that to which it was not entitled in the first instance. App. A at 10a-12a; 177 F.3d at 1109.

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTION AS TO EMPLOYEES' STANDING DIRECTLY ADDRESSES THE POWER OF INDIVIDUALS TO PROTECT THEMSELVES AGAINST THE GOVERNMENT'S IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT.

At first blush, the first issue presented appears to be a routine standing question, an issue addressed many times by this Court. *See Clinton v. City of New York*, 524 U.S. 417, 118 S. Ct. 2091 (1998); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003 (1998); *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972). In these cases, among many others, this Court has repeatedly stated the familiar tripartite showing required to establish a litigant's standing: "A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. at 751, *citing Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-76 (1982).

However, the standing issue in this case is **not** routine. By ignoring the important interest of public employees in the government's responsibility to refrain from violating their constitutional rights, the panel below failed to apply the standards set forth by this Court. As a consequence, in addition to the increased risk of future violations of their constitutional rights by illegal agency fee seizures in the absence of compliance with the "constitutional requirements for the ... collection of agency fees," *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986), these employees will be compelled to subsidize the public employer's defense against their meritorious lawsuit to vindicate their constitutional rights for violations that already have occurred.

A. The Conflict With This Court's "Standing" Decisions.

Insofar as the employees seek prospective declaratory relief that Respondents' indemnification scheme is void as against public policy, the panel failed appropriately to analyze the employees' standing under this Court's decision in *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), which holds that litigants seeking such relief satisfy standing requirements when they show a "real or immediate threat that [they] will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" *Id., quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974).

Surely this standard is satisfied by at least four of the employees, who remain County employees subject to the County/EDCEA MOU, and its forced-unionism provisions.[3] In *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 74 (2d Cir. 1982), the court struck down a similar indemnification agreement, citing the fact that the union's payment of the public employer's damages for entering into an unlawful CBA will be derived from, "at least in part, funds collected as dues from the plaintiffs themselves or from members of the plaintiff class." *Id., citing Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) (union may not bargain away minority employees' right to equal treatment). Similarly, the employees here face the very real prospect of subsidizing the opposition to their own lawsuit, when EDCEA indemnifies Respondents County and Libicki, and attempts to charge bargaining unit employees for those costs.

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[3] Certainly, the prospect that the employees will be subjected to illegal fee seizures is more concrete than the prospect that Mr. Lyons would again be stopped for a traffic violation and subjected to a chokehold by a Los Angeles police officer. *Lyons*, 461 U.S. at 98, 100.

The prospect that the employees' will be forced to subsidize the County's defense is akin to the "contingent liability" found sufficient by this Court to confer standing upon the City of New York and the Snake River farmers' cooperative in *Clinton v. City of New York*, 524 U.S. 417, ___, 118 S. Ct. 2091, 2099-2100 (1998). There, in a challenge to the constitutionality of the Line Item Veto Act, 110 Stat. 1200, 2 U.S.C. § 691 *et seq.*, the United States Government argued that there was no "actual injury [to the City] because the claims are too speculative," 524 U.S. at ____, 118 S. Ct. at 2099, citing the Government's failure to take certain actions necessary to obtain the benefit sought by the City. This Court rejected that argument, comparing the complained-of action (the President's exercise of his authority under the Act) to an appellate court's setting aside of a defense verdict, with remand for a new trial of a multibillion dollar damage claim. As the Court noted, "Even if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a favorable final judgment." *Id.*

Similarly, the panel below was confronted with the allegation that the indemnification clause was void as against public policy because it created disincentives to the public employer's protection of the employees' constitutional rights, and the uncontroverted fact that the public employer had done nothing to ensure that its employees' constitutional rights were not violated. This Court in *Clinton* discussed those cases where "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result." 524 U.S. at ____ n.22, 118 S. Ct. at 2101 n.22, *citing Northeastern Florida Chapter of the Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993).

As this Court noted in *Jacksonville*, a showing that, but for the challenged action, a plaintiff would have received the benefit sought is not required to overcome a challenge to his standing. 508 U.S. at 664-65. This Court has repeatedly rejected imposition of such a requirement. *Id., citing Turner v. Fouche*, 396 U.S. 346, 361 (1970) (non-property owning plaintiff need not show that he would have been appointed to school board but for requirement that members be property owners, only that he would have been considered for the position); *Clements v. Fashing*, 457 U.S. 957 (1982) (rejecting claim that dispute was "merely hypothetical" because litigants could not show they actually would have been elected, but for "automatic resignation" provisions of Texas state constitution); *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (requisite injury shown by refusal of state to allow litigant to compete for benefit sought). Similarly, the employees here need not show that Respondents County and Libicki would have eschewed fee seizures in the absence of the indemnification provision. Indeed, the principle of *res ipsa loquitor* would seem to apply to a clause which appears within the "Fair Share" section of the "UNION RIGHTS" article of the MOU, and contains language specifically stating that its terms apply to "the collection and procedures for collection of fair share fees." R. 1, Complaint, Exhibit A, Article 4, § 3(J). To hold, as the panel did, that the employees must make an additional showing is to hold that the clause is virtually devoid of meaning and effect.

The panel below required the employees to make a showing never required by this Court to establish standing, stating that the employees were required to show that the relief granted "would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were." App. A at 16a, 177 F.3d at 1112.[4] A showing that the County would not have illegally seized the fees but for the disincentives represented by the indemnification clause is a showing never before required by this Court to establish standing. It is enough that the employees show that Respondents County and Libicki would have been forced to consider their own potential financial liability for unlawful fee seizures in the absence of the clause.[5] This, of course, Respondents County and Libicki would have been required to do, if the indemnification clause were not in the County/EDCEA MOU's agency shop provision, or if it were void as against public policy.

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[4] In condemning the employees' "speculation," the panel misstated the "irenic world" sought by them. The world envisioned by the employees is not one "wherein all fee deduction procedures were properly followed." App. A at 16a; 177 F.3d at 1112. Rather, it is a world wherein a public employer will decline to enforce—on behalf of a union—the agency shop provision of its CBA (continued...)

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[4] (...continued)
when the constitutionally-adequate notice and procedures are not provided. While it is not unreasonable to recognize that the obligation to provide the notice and procedures falls mainly on the union, the duty to avoid constitutional harm by seizing fees or threatening termination upon non-payment falls squarely upon the public employer, a fact previously recognized by the Ninth Circuit, *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), *cert. denied on other grounds sub nom. Anchorage Education Association v. Patterson*, 523 U.S. ___, 118 S. Ct. 2060 (1998), based upon its reading of this Court's decision in *Hudson*, 475 U.S. at 307 n.20.

[5] The panel took great solace in EDCEA's argument that the union "already has that incentive in a powerful form," insofar as it might be denied "a portion of the fair share fee," *viz.*, the portion to which it was not entitled anyway, and that it faces "substantial and expensive litigation." Unmentioned by the panel was record evidence that EDCEA and its affiliate, PEU, collected agency fees from 484 other similarly-situated nonmembers (including 98 others in the County bargaining unit), yielding as much as $197,472.00 in 1995 alone. R. 24, Plaintiffs' Statement of Undisputed Material Facts in Support of Their Motion for Summary Judgment, Exhibit 1 (Defendant Public Employees Union, Local #1's Responses to Plaintiffs' Interrogatories), page 17 and Exhibits B and C. Clearly, the rewards enjoyed by EDCEA and its affiliate in defying *Hudson*'s mandate greatly outweigh even the most charitable estimate of their exposure in this lawsuit over the years for these five individuals.

Finally, the lower courts' shifting justifications for the conclusion that the employees lack standing to challenge the indemnification clause mean, as a practical matter, that the employees had no real opportunity to make the requisite showing, thus raising serious due process questions.

As noted *supra*, the district court's determination that the employees lacked standing was made *sua sponte*, without any warning whatsoever. Respondents had not raised it as a defense to the employees' challenge, R. 13, Defendants' Answer, and had not argued it in their various summary judgment papers. R. 31 & 33. Likewise, the indemnification clause was not discussed at oral argument on the pending motions for summary judgment. R. 51, *supra*. Similarly, the panel rooted its holding in an assertion that the injury—that "fees were deducted from [the employees'] paycheck[s]," App. A at 16a; 177 F.3d at 1112—was somehow "indirect," and that the employees had failed to show the necessary link between the indemnification clause and the County's failure to fulfill its duty "to evaluate the sufficiency of the union's notice at the time the union seeks to take action against a nonmember for failure to pay the agency fee." *Knight*, 131 F.3d at 817.

Of course, the panel reached this new conclusion without mention of the manner in which the issue was decided by the district court, which as a practical matter amounted to an "ambush," denying the employees the opportunity to make the necessary showing. These shifting justifications for finding that the employees lacked standing strongly suggest that the conclusions of the courts below were rooted not so much in doubts as to the employees' standing as they were in the courts' unwarranted desire to avoid deciding the issue. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (discussing burden at various stages in litigation).

B. The Conflict With This Court's Decisions Specifying Governmental Responsibilities When Enforcing An Agency Shop Scheme.

Underlying the panel's novel conclusion that employees lack standing to challenge the legality of one of the terms of the CBA governing their terms and conditions of employment[6] is: (1) a disregard for the government's duty to refrain from unconstitutional conduct, and its culpability for its unconstitutional seizure of "agency fees" from nonunion public employees for the benefit of a monopoly bargaining representative; and (2) confusion over the injury suffered by nonunion employees subjected to unlawful enforcement of a forced-unionism scheme.

As to the first question, this Court unambiguously declared that "the **government** and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" when they enter into and attempt to enforce a forced-unionism provision. *Hudson*, 475 U.S. at 307 n.20 (emphasis added). The panel discarded that definitive statement of **government** responsibility to validate an agreement which it viewed as "plac[ing] the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees." App. A at 16a; 177 F.3d at 1112.

Moreover, the panel misstated the public employer's responsibility when entering into forced-unionism agreements, *i.e.*, to decline to enforce them when the notice and procedural safeguards required by *Hudson* and its progeny have not been satisfied.[7] Underlying the panel's decision is confusion over the nature of a nonmember's injury. The panel failed to recognize that a nonmember is not only injured by a failure to comply with *Hudson*, but also by the seizure of agency fees in the absence of "the constitutional requirements for the ... collection of agency fees."[8] 475 U.S. at 310; *cf. Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, ___ n.4, 118 S. Ct. 1761, 1767 n.4 (1998) (rejecting the argument that "[i]llegality depends on the spending of compelled agency fees for ideological purposes, ... not simply the initial collection of those fees") (emphasis omitted).

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[6] Save for those cases finding claims barred for failure to exhaust contractual remedies, the employees have found no other authority holding that employees lack standing to challenge the legality of the contract establishing their terms and conditions of employment. Certainly, the panel below cited none. Hence, its conclusion was nothing if not "novel."

Additionally, the panel ignored the very real threat of palpable and direct injury upon enforcement of or compliance with the indemnification agreement. Owing to the forced-unionism agreement, the employees are forced to subsidize EDCEA's expenditures. Thus, contrary to the panel's dismissal of the employees' injury and prospective injury as "speculative," the prospect of **additional** financial injury (beyond the County's past illegal seizures of agency fees) is both real and imminent, insofar as the employees remain subject to the County/EDCEA forced-unionism agreement.[9] Indeed, given the renewal of agency fee seizures after the district court's order of January 1998, App. C, they might already have suffered that injury.

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[7] Two methods of enforcement are available. Where, as here, the state's wage assignment law authorizes involuntary fee deductions, the public employer seizes the fee from the employee's wages and forwards it to the union. Other regimes bar union dues and fee deductions absent explicit written authorization by the employee, and require employers to discharge employees refusing to comply with union demands for payment of dues or fees. *See, e.g.*, 29 U.S.C. § 186(c) (governing wage assignments under National Labor Relations Act, 29 U.S.C. § 151 *et seq.*

[8] The panel seems to have assumed that a union always will bring itself into compliance with "the constitutional requirements for the Union's collection of agency fees," *Hudson*, 475 U.S. at 310, notwithstanding the financial or administrative burden, or other barriers to compliance.

This Court has unequivocally recognized that a union may not charge objecting nonmembers for "the expenses incident to [an illegal] strike." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 531 (1991); *accord id.* at 562 (opinion of Scalia, J.). As the Court said, "[w]e can imagine no legitimate governmental interest that would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow." *Id.* at 531. Similarly, no legitimate governmental interest can be served by compelling objecting employees to subsidize a public employer's costs of defending itself against those employees' valid claims that it violated their First and Fourteenth Amendment rights by seizing agency fees in the absence of compliance with *Hudson*.

From its first public-sector agency fee case, this Court has:

> recognized that requiring nonunion employees to support their collective-bargaining representative "has an impact upon their First Amendment interests," ... and may well "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit."

Hudson, 475 U.S. at 301, *quoting Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977); *see also id.* at 255 (Powell, J., concurring in the judgment); *Lehnert*, 500 U.S. at 517-19; *see also Ellis v. Railway Clerks*, 466 U.S. 435, 447, 455-56 (1984) ("[B]y allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"; "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees"). Thus, the coerced subsidization that occurs through the indemnification provision in a case such as this not only serves no legitimate governmental interest; it violates the employees' First Amendment rights.

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[9] While not reflected in the record, Petitioner Karen Pierce left her bargaining unit employment during the pendency of this lawsuit, and therefore does not face the prospect of compelled subsidization of EDCEA's indemnification expenditures. However, because the other employees possess standing on this basis, this Court need not consider whether Pierce also possesses standing on this theory. *Clinton*, 524 U.S. at ___ n.19, 118 S. Ct. 2100 n.19, *citing Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

When it shifted from the district court's "injury because *Hudson* was not followed" justification (App. C. at 34a-35a), to an "injury in the fee seizures but no connection to indemnification" justification (App. A at 16a) for denying the employees' standing, the panel below ignored that the employees face the prospective of real economic injury in EDCEA's indemnification of the County and Libicki from their actions in enforcing the MOU's agency shop provisions, and in defending this lawsuit. The County/EDCEA MOU thus adds the insult of requiring objecting nonmembers (among all represented employees) to subsidize the County's injury of them by EDCEA's assumption for all financial liability arising out of illegal County seizures of agency fees. Certainly, the very real prospect of that concrete injury is sufficient to confer standing upon the employees here to challenge the legality of that agreement in their suit for declaratory relief. *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

C. The Conflict Among The Circuits.

In addition to the Ninth Circuit in this case, at least two other courts of appeals have faced the indemnification issue in the context of forced-unionism agreements. *See Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992), *cert. denied sub nom. Weaver v. Steger*, 507 U.S. 917 (1993); *Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992). Another panel of the Ninth Circuit likewise faced nonunion employees' challenge to an indemnification provision. *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997). None has eluded the merits by adopting the position of the panel in this case.

The Third Circuit was the first court of appeals to address the merits of the issue in a published opinion, expressly holding that similarly-situated employees possess standing to challenge an indemnification agreement in *Hohe*, 956 F.2d at 411-12. There, the district court had rejected an employee's challenge to the indemnification provision at the same time it rejected a challenge to a statute requiring the public employer (the Commonwealth of Pennsylvania) to withhold agency fees "even if the necessary procedural safeguards have not been implemented." *Hohe v. Casey*, 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), *rev'd in pertinent part*, 956 F.2d 399, 412 (3d Cir. 1992). As to that question, the district court held that even if the union's procedure were held to be constitutionally defective, "[t]he fact that the Commonwealth might not have earlier barred fee collection would not make the plaintiffs more victorious," and that "under the facts of this case it is unnecessary to consider the plaintiffs' challenge to [the statute]." 740 F. Supp. at 1099. In a footnote, the district court went on to state that, "For the same reasons we also reach that conclusion with respect to the indemnification clause in the collective bargaining agreement." *Id.* at n.5.

On appeal, the nonmembers in *Hohe* only made the same arguments on the merits as the employees made here, *i.e.*, that the indemnification clause "is void as against public policy." 956 F.2d at 411. And the Third Circuit explicitly held that employees subject to the CBA possess standing to challenge its terms: "We find ourselves in disagreement with the ruling of the district court that it need not decide this issue. We say so because we think the theory advanced by the plaintiffs' attack on the clause raises a cognizable legal issue." *Id.* at 411.[10]

Shortly thereafter, the Sixth Circuit issued its published decision on the issue, becoming the first appellate court to declare such clauses void as against public policy in the context of forced-unionism agreements. *Weaver*, 970 F.2d at 1536-38.[11] That decision is devoid of any suggestion whatsoever that employees lacked standing to sustain their successful challenge to the indemnification provision, finding it sufficient that the clause "protect[s] the University from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." *Weaver*, 970 F.2d at 1538 (other citations omitted).

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[10] As the Third Circuit recognized, the district court in *Hohe* had found it unnecessary to decide the issue because it "found no independent legal consequences flowing from the indemnification clause in the collective bargaining agreement." 956 F.2d at 411. This is a virtually explicit reference to the second of the three requirements necessary to establish "standing," *i.e.*, that "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court.'" App. A at 16a; 177 F.3d at 1111-12, *citing Lujan*, 504 U.S. at 560-61. On the merits, the Third Circuit held that the indemnification clause was not void. *Hohe*, 956 F.2d at 411-12.

[11] Another panel of the Sixth Circuit had issued an earlier decision declaring such clauses void as against public policy, but that decision was unpublished. *Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990). In that case, too, there was no question that employees possessed standing to challenge one of the provisions of the CBA governing their terms and conditions of employment. Other district courts in the Sixth Circuit, including the lower court in *Weaver*, had previously issued decisions declaring such clauses to be void as against public policy. *Weaver v. University of Cincinnati*, 764 F. Supp. 1241, 1247-48 (S.D. Ohio 1991), *aff'd in pertinent part*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied sub nom. Weaver v. Steger*, 507 U.S. 917 (1993); *Jordan v. City of Bucyrus*, 754 F. Supp. 554, 558-59 (N.D. Ohio 1991).

Implicit in any federal court's merits determination is a finding that the parties before the court possess the requisite standing, *National Organization for Women v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is open to review at all stages of the litigation); *cf. Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993) (standing is a jurisdictional question that must be addressed at the threshold of any case), for it is "an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. Indeed, when the party before the court lacks standing, there is no case or controversy, and the court lacks jurisdiction. As this Court recently has reaffirmed, "'Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, ___, 118 S. Ct. 1003, 1012 (1998), *quoting Ex parte McCardle*, 7 Wall. 506, 514 (1868); *see also National Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 180 (D.C. Cir. 1996).

Thus, implicit in the Sixth Circuit's merits determination is the conclusion that it possessed jurisdiction to decide the issue presented to it.

Perhaps the most apt authority disregarded by the court of appeals, though, was its own. Less than two years earlier, another panel of the court addressed the merits of a challenge to the enforcement of a similar indemnification provision brought by similarly-situated employees. *Knight v. Kenai Peninsula Borough School District*, 131 F.3d at 817. There was no question but that the employees had standing to challenge the enforceability of the indemnification provision in that case; the district court had "quickly disposed of" the argument that employees "are not a proper party to sue on a contract of indemnity and that they have met their constitutional duty and are therefore not negligent." Petition for a Writ of

Certiorari, Anchorage Educ. Ass'n, et al. v. Patterson, et al., No. 97-1454, Appendix C at 47a. However, recognizing that *Knight* presumed that employees possess standing to challenge an indemnification provision in the CBA governing their terms and conditions of employment, the panel here suggests that the decision was rendered in some unidentified context other than a similarly-situated employee's challenge to the enforceability of the indemnification provision. App. A at 15a; 177 F.3d at 1111.

In sum, then, the Court should grant *certiorari* to settle the conflict among the circuits as to whether employees subject to a forced-unionism provision agreement possess standing to challenge the legality of an indemnification clause in that agreement.

II. THERE IS WIDESPREAD CONFLICT AMONG THE CIRCUITS AS TO WHETHER UNIONS MAY INDEMNIFY STATE AND LOCAL GOVERNMENTS FOR THEIR CONSTITUTIONAL TORTS WHEN ILLEGALLY ENFORCING FORCED-UNIONISM AGREEMENTS.

A. The Conflict.

Like this, *Teachers Local No. 1 v. Hudson* was a case brought pursuant to 42 U.S.C. § 1983. 475 U.S. 292, 298 n.3 (1986). There, this Court addressed "whether the [agency shop] procedure used by [a union] and approved by [a public employer] adequately protects the basic distinction drawn in *Abood*," between "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302, *quoting Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 237 (1977). "[A]nalyz[ing] the problem from the perspective of the First Amendment concerns," 475 U.S. at 304 n.13, the Court determined that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis of the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310. The Court specifically stated that, in this context, both "the government and union have a responsibility to provide procedures that minimize that impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20, *citing Ellis*, 466 U.S. at 455.

It logically follows from this explicit statement of government responsibility that public employers may not, without running afoul of constitutional norms, collect agency fees from nonmember employees on behalf of the labor organization representing bargaining units of those employees absent strict adherence to these "constitutional requirements," *Hudson*, 475 U.S. at 310, and that they are liable to the employees from whom they collect such fees if they do so.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, created a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law," *Monroe v. Pape*, 365 U.S. 167, 176 (1961) (original emphasis); *see also District of Columbia v. Carter*, 409 U.S. 418, 426 (1973), in order to "protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), *quoting Ex parte Virginia*, 100 U.S. 339, 346 (1879). The catalyst for this statutory enactment was widespread violence against blacks and their supporters by the Ku Klux Klan. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *see also* 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1.3 (3d ed. 1997). It was rooted in a grave distrust of state and local officials to enforce federal constitutional rights against—and perhaps in league with—powerful local interests committed to the violation of the federal constitutional rights possessed by individuals.

Thus, in a broad sense, State and local governments bear responsibility for their "constitutional torts." 42 U.S.C. §§ 1983 and 1988 (West Supp. 1999). The purpose of the Civil Rights Act of

1871, 42 U.S.C. § 1983, is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992), *citing Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (deterrence of future abuses of power is an important purpose of this section).

Yet surprisingly, the United States Courts of Appeals are in deep conflict over whether public employers may negotiate and enforce agreements by which a labor organization indemnifies a public employer for any liabilities arising out of the unlawful enforcement of compulsory unionism provisions.

While the Ninth Circuit avoided the question in this case, at least three other courts of appeals have faced this issue, two in this specific context.[12] One, the Third Circuit, found that such agreements are permissible, and enforceable. *Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992). Another Circuit, the Sixth, takes a directly contrary position. *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992)(holding that "[a] clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy"). A third Circuit, the Second, agrees with the Sixth in a related context. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 73-75 (2d Cir. 1982).

While the Third Circuit's decision was the first to address this controversial issue in a published opinion, the Sixth Circuit addressed it earlier in an unpublished opinion in *Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990). Citing *Stamford*, *Cramer* reversed a district court judgment and remanded the case, directing the lower court to "strike [this] ... void provision[] from the policy." *Id.* at *4. The provision was void as against public policy because, "[u]nder *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid," and "clauses in collective bargaining agreements which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy." *Cramer*, 1990 WL 169640 at *4, *citing Stamford*, 697 F.2d at 73-75. *Cramer* concluded that "[w]ithout such a role, public employe[r]s would have **no incentive** to fulfill their constitutional duties." *Id.* (emphasis added). *Cramer* thus held that indemnification of a public employer by the union receiving the fees in this context is void as against public policy.

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[12] Another, the Seventh Circuit, enforced such an agreement on the facts of the case, but did not address the public policy issue raised herein. *Dixon v. City of Chicago*, 948 F.2d 355, 359-60 (7th Cir. 1991).

The Third Circuit acknowledged in *Hohe* that it was departing from the Sixth Circuit's unpublished *Cramer* decision, as well as a subsequent district court decision in the Sixth Circuit. 956 F.2d at 411, *citing Cramer* and *Jordan v. City of Bucyrus*, 754 F. Supp. 554, 559 (N.D. Ohio 1991). The Third Circuit declined to follow the Sixth Circuit's reasoning. The court noted the employees' concession that the Commonwealth and its high executive officials sued in their official capacity in the suit are immune from damages. The court then rejected the argument that the clause would encourage the public employer to violate the employees' constitutional rights by allowing it to escape liability for costs and attorneys' fees pursuant to 42 U.S.C. § 1988, because "the clause [does not] explicitly provide that [the union] will indemnify the Commonwealth for the costs or fees involved in defending any claim based upon its deduction of fair share fees." 956 F.2d at 411-12.[13] Even if it did, because the monopoly bargaining agent nas a significant incentive "to ensure that its procedures comply with the Constitution," *i.e.*, that "[f]ailure to do so may result in its being unable to retain a portion of the fair share fee," the Third Circuit held that "invalidation of the indemnification clause is not required by the First Amendment." *Id.* at 412.

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[13] This distinguishes *Hohe* from this case, where the indemnification clause specifies that indemnification includes the "reasonable cost of County's attorney fees and costs." R. 1, Complaint, Exhibit A, Art. 4, § 3(J).

The Sixth Circuit's decision in *Weaver* was the latest to decide this issue. This decision directly conflicts with that of the Third Circuit, and adopts virtually every argument rejected by the Third Circuit. The Sixth Circuit engaged in a detailed analysis of *Stamford*, as well as *Hohe*, concluding that the former was more persuasive than the latter. The Sixth Circuit declared that "the indemnification agreement in the present case was repugnant to public policy, and therefore, invalid," for two reasons. First, although "facially neutral," the clause "protect[s] the university from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." Second, the court recognized that "the university as a public employer had duties separate and apart from those of the union." *Weaver*, 970 F.2d at 1538 (other citations omitted). The Sixth Circuit, therefore, concluded that a "clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy." *Id.*

B. The Importance Of The Issue.

This question manifestly is important, both in practice and principle, as this Court previously recognized by granting *certiorari* in cases such as *Ellis v. Railway Clerks* and *Teachers Local No. 1 v. Hudson*.

It is important in practice, because the Court's resolution of this question will affect employees subject to a large number of such agreements. Public-sector compulsory unionism agreements are lawful in at least twenty (20) states and the District of Columbia. Milton L. Chappell, *Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model that Will Enhance the Viability of Independent Teacher Groups*, 16

GOV'T UNION REV. 1, 23-28 (table) (Summer 1995). As the cases above illustrate, public employee unions often are willing to assume the risk of the employer's liability in order to obtain and enforce forced-unionism agreements, and many such clauses thus contain indemnification provisions.

Whether public employers may be indemnified by labor unions from "any and all claims, demands, suits, orders, judgements or other forms of liability that shall arise out of or by reason of, action taken or not taken" pursuant "to the collection and procedures for collection of fair share fees," R. 1, Complaint, Exhibit A, Article 4, § 3(J), is important in principle, too, because a requirement that public employees support their monopoly bargaining representative implicates fundamental constitutional rights. Because the impairment of the First Amendment rights of public employees is implicit in any forced-unionism agreement, *Hudson*, 475 U.S. at 301 n.3; *see also Ellis*, 466 U.S. at 455, "the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n.20. Questions, such as that presented here, of how that responsibility is to be enforced against State and local complicity in the efforts of discrete, locally-powerful groups to violate the constitutional rights of another discrete, less-politically powerful group, *see Wilson v. Garcia*, 471 U.S. at 276, necessarily are important. Indeed, they are at the core of the fundamental congressional policy to create a remedy "against those who representing a State in some capacity [a]re *unable* or *unwilling* to enforce a state law," *Monroe v. Pape*, 365 U.S. at 175-75, represented by the Civil Rights Act of 1871, 42 U.S.C. § 1983.

This Court's intervention is necessary to establish conclusively nationwide that public employers that have surrendered their employees' unfettered right to choose whether to support their monopoly bargaining representative cannot avoid their "responsibility to provide procedures that facilitate a nonunion employee's ability to protect his rights" *Hudson*, 475 U.S. at 307 n.20, and cannot without economic consequence, in league with a labor union, "subject, or cause[] to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983 (West Supp. 1999).

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

September 1999

APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

12 May 1999

[177 F.3d 1102]

Steven PRESCOTT; Robert F. Berry; Cheryl L. Jones; Karen Pierce; Christine M. Turney, Plaintiffs-Appellants,

v.

COUNTY OF EL DORADO; Kathy Libicki; Local 1 El Dorado County Employees Association, Defendants-Appellees.

No. 98-15579.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 9, 1999.

Decided May 12, 1999.

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[1103]Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER,[1] District Judge.

Opinion by Judge FERNANDEZ; Concurrence by Judge McKEOWN.

[1104]FERNANDEZ, Circuit Judge:

Steven Prescott, an employee of the County of El Dorado, California, appeals from a determination of the district court that granted him limited relief on his claim that the assessment of fair-share agency shop fees against him was not fair.[2] The fees were for the purpose of supporting the El Dorado County Employees Association, Local # 1 (EDCEA), the union which represents him and the other employees of the County who are in his bargaining unit. Prescott is not a member of the EDCEA. He objects to the district court's approval of the escrow provisions, its failure to order full restitution of fees, its remanding him to using the union's arbitration procedures, and its failure to strike down an indemnification provision under which the EDCEA protects the County against losses. We affirm in part, reverse in part, and remand.

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[1] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[2] Robert E. Barry, Cheryl L. Jones, Karen Pierce and Christine M. Turney also appeal. What we hold regarding Prescott applies equally to them.

BACKGROUND

Prescott, an employee of the County, is covered by a collective bargaining agreement (CBA) between the County and the EDCEA. The CBA establishes an agency shop arrangement. Employees in the bargaining unit must either be members of the union or pay a fair-share agency fee. Those who are not members, but who must pay the fair-share fee, are sometimes referred to as nonmembers or fee payers. EDCEA is an affiliate of the Public Employees Union, Local # 1 (PEU), and all dues for the EDCEA are paid to PEU. Members dues amount to 1 percent of gross salary, up to a maximum of $34, plus $1 per pay period. It appears that fee payers are not charged the $1, which EDCEA receives and controls. EDCEA has 570 members and 114 fee payers; PEU has more than 9100 members and 482 fee payers.

In April 1995, EDCEA gave notice to nonmembers that the County would begin to deduct a fair-share fee from their paychecks, which amounted to 98 percent of the full union dues. That reflected PEU's determination that 98 percent of its expenditures were for chargeable activities, that is, activities which did benefit nonmembers. It explained that the union uses the fair-share fee to defray the costs incurred for both individual and group representation in employment relations with the County, and that the actual costs for nonchargeable expenditures were less than 2 percent. Nonmembers were also subject to a deduction equivalent to the union initiation fee (variously said to be $35 or $45). PEU's procedure was to collect the entire agency fee from all nonmember employees, but to place 2 percent of that fee into an interest bearing escrow account. The notice provided that if a nonmember did not agree with the computation "the Union will set aside 4% of the fair-share fee in an interest-bearing trust for each fee payer who registers his dissent, to be held in an escrow account...." It further explained that "[o]nce the fee payer has objected to the amount of the fees paid into escrow, he/she may demand that the fees [2%] paid to escrow be paid to them and their monthly agency fee reduced by that amount thereafter."

The notice included a schedule of PEU's projected expenditures for the 1995 fiscal year, based upon expenditures for the 1994 fiscal year. Those were, it was said, reported "on a [PEU] wide basis...." The fund resulting from the $1 per member fee retained by the EDCEA, which Prescott estimates at nearly $15,000 annually, was not separately mentioned in this, or other, financial schedules.[3] The projection identified the major categories of expenses and an asterisk was placed next to those categories which the union identified as "nonrepresentational expenditures," including (1) ideological expenditures, (2) social events, gifts and donations, (3) contributions to political education fund, and (4) **[1105]**blood bank. The notice explained that "[f]air-share fees do not include any expenses incurred for political action, social activities or organizing expenses. Organizing expenses are those incurred to bring new bargaining units into representation by [PEU]." The notice also included a statement of PEU's revenues and expenses for the 1994 fiscal year, which listed the major categories of expenses and indicated whether they were paid from the general operating fund or the political education fund. According to the 1994 statement, only contribution expenses and bank charges were paid by the political education fund. Contributions for political education and social events, gifts, etc., came from the general fund. The notice also included a letter from a certified public accountant, which reported that the 1994 statement was reviewed in accordance with standards established by the American Institute of Certified Public Accountants, and that it conformed with generally accepted accounting principles.

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[3] The letter did specify that the fees would be "98% of the 1% of the fee payers gross salary," while dues are "1% of gross salary, plus $1 per pay period."

The district court agreed with Prescott to the extent that he objected to certain procedures that PEU had created for the purpose of challenging the fees. It, therefore, entered a preliminary injunction prohibiting the collection of fees until the procedures were corrected. *See, Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1092 (E.D. Cal. 1996) (*Prescott I*). They have been corrected, but the court, upon cross motions for summary judgment, made the injunction permanent.[4] Neither the County nor EDCEA has appealed from that judgment. The district court did not otherwise agree with Prescott, and granted summary judgment against him on the other issues. Thus, he has appealed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *See Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). That, of course, means that we must determine for ourselves whether "genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.* Insofar as Prescott attacks the indemnification provision between EDCEA and the County, standing is in question. We review standing questions de novo. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir.1996).

DISCUSSION

While the district court did grant partial relief to Prescott, it deflected his attacks on the adequacy of the financial statements regarding PEU's and EDCEA's income and expenses, about the size of the required escrow account, about the need for full restitution to Prescott, about the proper forum to decide whether the fair-share fee was fair, and about the propriety of the indemnification clause in favor of the County. In short, Prescott won a skirmish and continues to hold that piece of ground, but he lost the rest of the engagement. He asks us to come to his rescue. We shall, in part. In order to do so, we must survey the contours of the field adumbrated by the Supreme Court.

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[4] The parties indicated to the district court that the case could be decided on summary judgment. Although it was somewhat dubious, the court took them up on that.

From the very beginning, the Court has expressed the view that, while it is appropriate to impinge upon objecting employees' freedom of choice in order to require those who share in the benefits of union representation to help "defray the expenses ... of collective agreements, [and] the expenses entailed in the adjustment of grievances and disputes," it is not appropriate to take their money "to support candidates for public office, and advance political programs" of the union. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768, 81 S.Ct. 1784, 1800, 6 L.Ed.2d 1141 (1961). And it is the union, **[1106]**not the employee, that bears the burden of demonstrating just what proportion of union expenditures is devoted to functions other than those which can properly be charged to dissenting employees. *See Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 1163-64, 10 L. Ed. 2d 235 (1963).

Those earlier cases involved the unique area of railroading, but when it was called upon to consider the area of public employee unions, the Supreme Court reached the same conclusions. Again, it recognized the fact that agency shop provisions do impinge upon an employee's freedom of choice, but emphasized the more potent fact that they counteracted the incentive to become a free rider, who refuses to contribute to the union while happily obtaining the benefits of union representation. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221- 22, 97 S.Ct. 1782, 1792-93, 52 L. Ed. 2d 261 (1977). Again, it declared that an objecting employee could not be forced to pay dues or assessments to support or advance the union's political or ideological causes, which were "not germane to its duties as collective-bargaining representative." *Id.* at 235, 97 S.Ct. at 1800. Then, in *Ellis v. Brotherhood of Ry. Airline & S.S. Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L. Ed. 2d 428 (1984). The court summed up as follows:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448, 104 S.Ct. at 1892.

So much for the substance, but what about the procedure? The Court addressed that question in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L. Ed. 2d 232 (1986), where it concluded that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078.

It is with these general principles in mind that we turn to the principal disputes in the agon between Prescott and the EDCEA.

A. *Explanation of the Basis of the Fee*

There can be little doubt that PEU did give a rather detailed notice and a goodly amount of explanation of the fee to the nonmember fee payers. But quantity is not necessarily quality, and Prescott claims that the notice fell short because the financial schedules were not properly verified. That the schedules were not audited can hardly be doubted, but EDCEA asserts that they need not be. The district court agreed. *See Prescott I*, 915 F.Supp. at 1089-90. We do not.

An accountant or auditor can provide three levels of service: a compilation, a review, or an audit. A compilation involves the preparation of a financial statement regarding which the accountant expresses no assurance of accuracy, completeness, or conformity with generally accepted accounting principles. Larry P. Bailey, *Miller GAAS Guide* 14.19-14.20 (1999). A review constitutes a higher level of service, resulting in an expression of limited assurance. In a review, an accountant relies on the representations of **[1107]**management to issue a report "stating that he or she is not aware of any material modifications that should be made to the financial statement in order for it to be in conformity with" generally accepted accounting principles. *Id.* at 14.25; *see generally, id.* at 14.25-14.28. In contrast, an audit consists of sufficient independent examination to express an opinion on the fairness, in all material respects, of the financial statement. *Id.* at 1.03, 11.05-11.06. An audit, unlike a review, generally requires the accountant to assess the organization's internal control procedures, examine evidence supporting the amounts in the financial statement using an appropriate sampling frequency, observe inventories, and confirm accounts receivable. *Id.* at 14.25-14.26, 11.05-11.06; *see id.* at 9.03-9.31 (sampling techniques). Although audits may vary in procedures and sampling rates, and therefore in level of audit risk, *see id.* at 9.05-9.07, an audit, as opposed to a review, offers at least some verification of the amounts disclosed in the financial statement.

The Supreme Court has emphasized that, "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect" them. *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076. In elaborating what sufficient information might be, the court said that, "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18. Later on, the Court returned to that theme when it spoke of the weight of "a certified public accountant's verified breakdown of expenditures...." *Id.* at 310, 106 S.Ct. at 1077. And yet again the Court spoke of a determination made "on the basis of the independent audit," and stated that an escrow figure "must itself be independently verified." *Id.* at 310 n. 23, 106 S.Ct. at 1078 n. 23.

Those statements would seem to make it clear enough that what is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way that the union says they are. For example, was an amount supposedly directed to "x" for negotiation expenses really dispersed to him, or did it go to "y", who is a union lobbyist? The district court did not believe that the Supreme Court really meant what it seemed to have said, but we have no doubt that the Court did understand its own use of language. This is not the first time that a court has said that.

Indeed, we said as much in *Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807 (9th Cir.1997), *cert. denied*, ___U.S. ___, 118 S.Ct. 2060, 141 L. Ed.2d 138 (1998). There we explained that "[t]he purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." *Id.* at 813. We went on to reject an attempt by the union to rely on figures when "no independent accountant has determined whether [the union] actually spent the amounts it claimed to have spent on chargeable expenses in the unaudited report." *Id.* We held, therefore, that the union's notice did not satisfy *Hudson*. The holdings of other courts are to the same effect. *See Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 682 n. 3 (6th Cir.1989) ("[A]n auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses."); *Andrews v. Education Ass'n*, 829 F.2d 335, 340 (2nd Cir.1987) (same). We do not see how a mere review of the union's records can offer the "verification" that the Supreme Court and we have spoken of. Audits are often required in the business and public arenas, where others seek assurance that the reviewed books of an organization really do reflect the concrete world transactions to which they refer. It is just that kind of assurance that **[1108]**nonmembers are entitled to, even though it may prove somewhat costly to obtain it. As the Second Circuit has pointed out, it is not a question of balancing the cost to the union against the First Amendment rights of the fee payers. "Excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson*'s requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Andrews*, 829 F.2d at 339. In short, a true audit was required.[5]

A somewhat smaller, yet important, piece of the puzzle is the district court's reliance on what has been called the local union presumption. *See Prescott I*, 915 F.Supp. at 1088-89. That is based on the assumption that local union units have spent their budgets in at least as favorable a way from a nonmember's standpoint as the overall larger union unit with which they are affiliated. That scheme gives no real information about just how the more local units really did spend their funds, but it does avoid the need of detailed information at least at the notice level. *See Price v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 927 F.2d 88, 93-94 (2d Cir.1991); *see also Finerty v. NLRB*, 113 F.3d 1288, 1289, 1291-92, (D.C. Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 558, 139 L. Ed.2d 400 (1997). Besides the cost savings, it has been said that there is some justification for the presumption because an objector can challenge it, whereupon the burden of persuasion on the question of the local unit's expenditures will fall upon the union. *See Price*, 927 F.2d at 94. With all due respect, that seems to put the cart before the horse because the notice is supposed to allow the nonmember to decide if there is a problem in the first place.

The reason for the presumption seems to be that the larger unit (here PEU) will certainly spend more on nonchargeable expenses than the local union (here EDCEA). But we see no reason to assume that is true. Rather, we agree with the Sixth Circuit "that such a local union presumption is unconstitutional" because " 'the use of the local union presumption increases the risk that the reduced fee collection from the objector would be in excess of what is appropriate.' " *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir.1990) (citation omitted). As the Third Circuit has said, the point of the notice is not simply to tell nonmembers how the union went about its business. It is to provide "nonmembers with information sufficient to gauge the *propriety* of the fee." *Hohe v. Casey*, 956 F.2d 399, 410 (3d Cir.1992). Without conveying to nonmembers the information on EDCEA's major categories of expenses but, rather, assuming that they were the same as those of PEU, nonmembers were left "in the dark about the portion of the fee attributable to chargeable expenses and [were] placed ... in the position of having to object to obtain the information needed to gauge the propriety of the fee." *Id.* at 411.

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[5] We express no opinion on the exact type of audit required under *Hudson*.

Nor can it be said that the amounts will always be so insignificant that *Hudson*'s demand for something less than absolute precision will always be satisfied. After all, in this case the total set aside for dissenters' challenges did not exceed 4 percent, and the amount involved in subventions to the local units was over 2 percent. Moreover, we see little reason to assume that the local units will use the same degree of care as the larger unit when it comes to handling their finances.

We do not decide that each little unit in the PEU firmament must necessarily be subjected to a separate verified audit of its expenditures, but we do decide that some auditor verifiable methodology which is more than a presumption is required if PEU and EDCEA are to fulfill their notice obligations. That methodology must be utilized with an eye on the purpose of the notice in the first place, that is to allow Prescott and others a reasonable opportu-[**1109**]nity to gauge whether the money taken from them is being spent on chargeable expenses.

Because the unaudited schedules attached to the notice were insufficient, we must turn to consider what steps were then required to protect Prescott.

B. *Restitution*

Prescott asserts that he must simply be given full restitution of all amounts collected from him, even though it must of necessity be true that some substantial portion of the fee was used for properly chargeable purposes. With that extreme position we do not agree.

As we see it, the court in *Hudson* did not insist on anything quite so radical; it did not see complete restitution as apodictic. Rather, it reflected on the fact that an escrow account would help alleviate the danger of even temporary use of nonmember fees for improper purposes. *See Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077. It pointed out that the escrow solution alone would not solve the whole problem, if the notice was insufficient or if the challenge procedure fell short. But, even then, it did not say that a 100 percent escrow was required, and it did not hold that the proper remedy was full restitution of all collected fees. *Id.* at 310, 106 S.Ct. at 1077-78. Prescott suggests that we have already decided that the remedy *is* restitution. We have done no such thing.

Prescott seeks to support his position by pointing to our decision in *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805 (9th Cir.1991). There, an airline pilot was not satisfied with the notice he was given, so he unilaterally reduced the fee demanded by the union from $36 per month to $10 per month. *Id.* at 807. We agreed with him that the union had failed to institute the proper procedures. Thus, we said, "the union has no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining" and its failure to comply with *Hudson* "can serve as a justification for Dean's unilateral reduction of fees." *Id.* at 809. Nothing in that determination suggests that a nonmember employee is entitled to full restitution whenever the union stumbles in its efforts to comply with *Hudson*.

Similarly, in *Knight*, upon which Prescott also relies, we merely said that the union's failure to comply with *Hudson* meant that it "was not entitled to the fees that it collected." 131 F.3d at 815. We did not say that meant that the union could not receive any fees whatsoever, and we went on to say that the employee was entitled to relief, but that we would "leave the measure of damages and the suitability of other relief for the district court to determine in the first instance." *Id.* Had we believed that the measure was simply complete restitution, we could easily have said so, but we did not and we see no reason for laying down so draconian a rule.

In our opinion, the Seventh Circuit got it just right when it said that a demand for full restitution was punitive insofar as it sought to deprive the union of fees to which it was, doubtlessly, entitled. *See Gilpin v. American Fed. of State, County, and Mun. Employees*, 875 F.2d 1310, 1315 (7th Cir.1989). It continued:

> [T]he union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things.... The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law....

Id. at 1316.

In fine, we agree with the district court that full restitution would be inappropriate, even though PEU did fail to meet all of its *Hudson* obligations. Any other rule would tend to suggest that the full constitutionality of the procedures and results must be established before fees are deducted. That would, as the Third Circuit **[1110]**has suggested, "render the escrow requirement," contemplated by *Hudson*, "completely unnecessary." *Hohe*, 956 F.2d at 406. That, of course, underscores an alternate source of protection for nonmember employees—the interest bearing escrow account itself.

C. *The Escrow*

The district court determined that the escrow cushion created by PEU's procedures was sufficient because it appeared that nonchargeable expenses were only 2 percent and, upon objection, the union would set aside 4 percent of which half went directly back to the dissenting fee payer while the other 2 percent remained in escrow pending adjudication. *See Prescott I*, 915 F.Supp. at 1091. Prescott asserts that the size of the escrow is plainly insufficient, and we are inclined to agree with him. We will explain, although we will not undertake to determine the proper amount in the first instance.

As we have already held, the difficulty here is that the procedure was flawed at its inception because of the failure to use audited financial statements. That means that the union's sanguine assumption that nonchargeable expenses amount to a mere 2 percent is unverified and provides insufficient notice to those who wish to gauge the accuracy of the union's representations. Because the district court was satisfied with the notice, its satisfaction with the size of the escrow account followed.

Prescott was not able to point to much in the way of specific errors in PEU's calculations, but, then, if he was not left entirely "in the dark," *see Hohe*, 956 F.2d at 411, he was at least presented with a fuliginous vista. EDCEA was required to give him more illumination than it did. In many ways, "[i]t is certainly in the union's interest to disclose sufficient financial data and other information about the agency fee prior to objections by non- members. Specific substantiation of the agency fee should reduce objections by non-members. Ambiguity rarely will have this effect, however...." *Tierney v. City of Toledo (Tierney III)*, 917 F.2d 927, 938 n. 9 (6th Cir.1990).

Due to its lack of proper verification, PEU's schedules failed in that respect. But that very failure meant, of necessity, that Prescott was unable to fully carry his burden of going forward with evidence of improper allocations. *See Air Line Pilots Ass'n. v. Miller*, 523 U.S. 866, ___, 118 S.Ct. 1761, 1768, 140 L.Ed.2d 1070 (1998). He did point to some anomalies, for example, newsletter expenses and subventions to local units like EDCEA. But who is to say what else lies buried beneath the surface of the merely reviewed books?

If a nonmember fee payer has carried the burden of pointing to questionable allocations, the burden of persuading the court that an expenditure was on the correct side of the line is with the union. It has the burden of persuasion because it is seeking to mulct an unwilling person for fees and must show its entitlement to them. *See Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 524, 111 S.Ct. 1950, 1962, 114

L. Ed.2d 572 (1991); *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075-76; *Lowary*, 903 F.2d at 431; *Price*, 927 F.2d at 94.[6]

Because of the nature of the defect here, the amount in dispute for the purpose of setting up an escrow account is rather problematic. Of course, it is not satisfactory for a union to fail to make disclosures, and then comfortably sit back while the entire fee is escrowed and the nonmember employees are left to strike out at their antagonist like andabatae. *See Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1375 (9th Cir.1993). That, however, does not mean that an interest bearing escrow procedure is **[1111]**improper, for there will be times when it is needed (even up to 100 percent) while the parties work out their differences. *See id.* at 1374; *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir.1989), *adopted en banc*, 992 F.2d 1295, 1302 (4th Cir.1993); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.1989); *Andrews*, 829 F.2d at 338; *see also Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir.1990).

In this case, the union has not acted with abandon or insouciance; it has, instead, misunderstood the financial statement requirements which we now make plain. Nevertheless, it cannot be said that a mere 4 percent of the union's charges remains in reasonable dispute. We are dubious about the suggestion that the amount in dispute should be considered to be as high as 100 percent; surely PEU is using some substantial amount of the fees charged for plainly proper purposes. We say this with some trepidation, because it can easily be argued that unverified financial statements are like no information at all. Again, that does appear to overstate matters, and we do not think it our place to attempt to determine precisely how much should be set aside under the circumstances of this case. That, like other determinations in this area, is more properly for the district court in the first instance. *See Hudson*, 475 U.S. at 310, 106 S.Ct. at 1078.

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[6] No doubt the protesting employee may ultimately have a separate burden of persuasion on the issue of whether he, himself, actually overpaid. *See Harmsen v. Smith*, 693 F.2d 932, 945 (9th Cir. 1982). We suppose that in most instances resolution of that issue will be parasitic on the determination regarding the union's allocation, but do not hold that is necessarily so.

Once it is recognized that further proceedings are necessary, the next question is: in what forum should those proceedings take place?

D. *The Forum*

The district court determined that the disputes between EDCEA and Prescott over the allocation of expenses between those which were chargeable and those which are not must be handled through the arbitration procedure created by PEU pursuant to *Hudson*. In that it erred.

As we have said previously, "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." *Knight*, 131 F.3d at 816. Since then, the Supreme Court has also so decreed. There is "no warrant for blocking dissenting employees from bringing their claims in federal court in the first instance, if that is their preference." *Miller*, 523 U.S. at ___, 118 S.Ct. at 1768. Therefore, "unless they agree to the procedure, agency-fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court." *Id.* at ___, 118 S.Ct. at 1769.

E. *Indemnification*

Prescott finally complains about the district court's failure to accord him standing to object to the provision which required EDCEA to indemnify the County from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims. We agree with the district court. We have alluded to this issue before. In *Knight*, 131 F.3d at 817, we determined that a public entity did not even have a duty to fee payers until the union sought to take some action against them for failure to pay the fees. However, we declined to entertain an attack upon an indemnification provision because the issue had been waived by the failure to raise it in the opening brief. *Id.*

Here, the issue has not been waived, but Prescott hurdled that trench only to run into a standing revetment. In order to meet constitutional standing requirements, a plaintiff must establish three elements.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'...." Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent ac-[**1112**]tion of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136, 119 L. Ed.2d 351 (1992) (citations omitted); *see also, Bennett v. Spear*, 520 U.S. 154, 167-71, 117 S.Ct. 1154, 1163-65, 137 L. Ed.2d 281 (1997); *Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433-35 (9th Cir.1998), *petition for cert. filed*, ___ U.S. ___, 119 S.Ct. 1802, ___ L.Ed.2d ___ (1999) (No. 98-1115). Prescott cannot meet these strictures.

While it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for Prescott's claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

Speaking of speculation, it can hardly be said that our striking down of the provision would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were. As EDCEA points out, someone—the union—already has that incentive in a powerful form. A failure to perform its duties properly "may result in its being unable to retain a portion of the fair share fee." *Hohe*, 956 F.2d at 412.[7] A failure to comply may also involve the union in substantial and expensive litigation, witness this case which has been in progress for over three years and will not be over for some time yet. Moreover, Prescott can suffer no ultimate damage to his interests because nothing in the indemnification agreement will prevent him from collecting any costs, expenses or losses imposed upon him by reason of the defective procedure.

In short, it simply cannot be said that any injury suffered by Prescott is fairly traceable to the agreement, nor is the claim that our striking of the agreement would redress or prevent the injuries that he has suffered anything but speculative.

CONCLUSION

In cases like this, the desire of unions to assure that everyone in the bargaining unit pays for the costs of the benefits conferred upon him runs up against the desire of employees to join and support what they like when they like. Thus, cases of this type can generate high emotions and lend themselves to philippics—the nonmember employees are sometimes called radicals or free riders and the unions are sometimes said to be insincere hypocrites who simply seek more money to manipulate. Here, however, no one claims that we face either sansculottes on the one hand or pecksniffians on the other. Rather, it is clear that we are dealing with individuals who have an honest dispute over what the Constitution requires.

There is nothing new about the requirement that PEU and EDCEA must send out a proper notice to all nonmember employees, but we now make it clear that the financial statements accompanying the notice must be audited (not merely reviewed) in order to *assure* that "the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." *Knight*, 131 F.3d at 813.

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[7] It should be noted that in *Hohe* the court suggested that there was standing, but did not decide the issue. *Id.* at 411.

In the meantime, all disputed fees, and absent an audited statement that could be a very substantial portion of what the union has charged, must be deposited into an interest bearing escrow account. The district court must then determine just what is chargeable and what is not. However, full restitution of the fees is not required if, as we think will surely be the case, at least some portion will be allocated to properly chargeable expenses.

AFFIRMED in part, REVERSED in part, and REMANDED. The parties shall bear their own costs on appeal.

McKEOWN, Circuit Judge, concurring:

Although I agree that the PEU's notice does not satisfy the requirements of *Chicago Teachers Union, Local No. 1. v. Hudson*, 475 U.S. 292, 306, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), and that remand is therefore necessary, I write separately because I believe that the majority unnecessarily reaches the issue of the constitutionality of the local union presumption.

We all agree that the PEU's failure to provide audited verification of its expenses violates *Hudson*. Because it is clear that the local affiliate, FDCEA, cannot rely on the parent union's (PEU's) constitutionally insufficient data, we need not decide the issue of the constitutionality of the local union presumption. While the majority properly interprets the Supreme Court's decision in *Hudson*, it ignores the Supreme Court's strong warning against premature adjudication of constitutional questions:

> As we have explained: If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.... It has long been the Court's considered practice not ... to decide any constitutional question in advance of the necessity of its decision ... or to formulate a rule of constitu-

> tional law broader than is required by the precise facts to which it is to be applied.

Clinton v. Jones, 520 U.S. 681, 690 n. 12, 117 S.Ct. 1636, 137 L. Ed.2d 945 (internal quotation marks and citations omitted).

If the notice based on the parent union's data is legally deficient, then the derivative data is similarly tainted for notice purposes. The "doctrine of avoidance," *id.* at 690, requires that we not reach out to decide whether the local union presumption passes constitutional muster as a general matter when, on the facts presented here, the EDCEA's reliance on the PEU's data is itself constitutionally deficient. In light of our reversal, at this point, the majority is only speculating as to what local union data the EDCEA and the PEU might bring before the district court on remand.

In addition, I have no doubt about the good faith of the parties in presenting this case, and do not join in the majority's gratuitous (and, by its own recognition, inapt) commentary regarding the conduct of other litigants in "cases of this type."

APPENDIX B

FINAL JUDGMENT IN A CIVIL CASE ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

1 April 1998

[Clerk's Stamp Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

STEVEN H PRESCOTT

v. CASE NUMBER: CIV S-95-1859 LKK JFM

COUNTY OF EL DORADO, et al

XX - - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 1/26/98.

Jack L. Wagner,
Clerk of the Court

ENTERED: April 1, 1998

by: /s/
K Carlos, Deputy Clerk

APPENDIX C

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

Filed 26 January 1998

[Clerk's Stamp Omitted in Printing]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN H. PRESCOTT, et al.,

Plaintiffs,

v.

COUNTY OF EL DORADO, et al.,
Defendants.
_______________________________/

NO. CIV. S-95-1859 LKK/JFM

ORDER

The Plaintiffs, non-union employees of El Dorado County (the "County"), challenge the right of the El Dorado County Employees Association ("EDCEA" or the "Union"), as a local affiliate of the Professional Employees Union, Local #1 ("PEU"), to collect fees pursuant to the agency shop provisions of the collective bargaining agreement entered into between the Union and plaintiffs' employer.

In its previous order the court preliminarily enjoined the Union from collecting a fair share agency fee until it provided a challenge procedure which allowed for the dispute to be resolved within 120 days from the date on which the fee was seized from the nonmembers' paychecks. *See Prescott v. County of El Dorado*, 915 F. Supp. 1080 (E.D. Cal. 1996). The court also ordered the Union not to impose upon nonmembers the "under penalty of perjury" and specificity requirements for challenging the fee. *Id.* The court, however, denied the balance of plaintiffs' motion. First, the court found that the notice provided an adequate basis for the fee because it identified PEU's major expense categories and provided nonmembers with sufficient information to ascertain which of those categories the Union deemed chargeable to nonmembers. The court reasoned that under *Chicago Teachers Union, Local No. 1, AFL-CIO v. Hudson* ("*Hudson*"), 475 U.S. 292, 306, n.18 (1986), the Union is only required to provide the nonmember with sufficient information to decide whether to challenge the legitimacy of the Union's fee, and did not require that the Union justify its expense in detail prior to the challenge. Employing the "local union presumption," the court also held that PEU need not provide a breakdown of the expenditures for each local affiliate, since local affiliates generally spend less money on political activity than state or national unions.

Recognizing the very limited record describing the difference between various types of financial reviews, the court also determined that, while adequate notice under *Hudson* must include "verification by an independent auditor," an accountant's "review" appeared to provide the verification required by the Supreme Court. The court noted, however, that the lack of a full record deprived it of an opportunity to definitively resolve the issue. *See Prescott*, 915 F. Supp at 1089, n. 13. Finally, the court held that plaintiffs did not demonstrate a likelihood for success on their challenge to the 4% escrow figure because plaintiffs did not show that more than 4% was reasonably in dispute.

The parties now cross move for summary judgment. Plaintiffs continue to maintain that the notice and procedures violate the First, Fifth and Fourteenth Amendments because they (1) do not contain audited financial disclosures of the expenditures of EDCEA and affiliated labor organizations receiving money from EDCEA, (2) utilize an unconstitutional standard of chargeability, and (3) contain unduly burdensome procedures for challenging the fee. Plaintiffs seek a declaratory judgment stating that the defendants have violated the constitutional requirements for collecting an agency fee, a permanent injunction against all fee "seizures" from the nonmembers, and restitution of all fees already "seized" from nonmembers. Finally, plaintiffs request a declaratory judgment that the indemnification agreement between the County and EDCEA is void as against public policy.

Defendants argue that the court should grant them summary judgment primarily for the reasons discussed in the court's preliminary injunction order. With regard to the "verification by an independent auditor" required by *Hudson*, defendants argue that an accountant's review suffices because it provides nonmembers with the information pertinent in assessing the validity of the fee, and that an audit would burden the Union with an unnecessary cost. Defendants also move to dissolve the preliminary injunction on the basis that the

Union has instituted a procedure which permits a nonmember to have a hearing within sixty days from making a challenge to the fee, and to obtain a final decision within thirty days from the hearing. I turn first to a brief description of the overall problem, and then address the particular claimed deficiencies.[1]

The High court has held that there are "constitutional requirements for the Union's collection of agency fees [which] include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. The purpose of the prerequisites is to insure that nonunion employees have "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Hudson*, 475 U.S. at 303. In sum, the procedures seek to insure that the nonmember has sufficient information to make an intelligent choice to either accept or challenge the fee. *Id*; *see* also, *e.g., Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987) (disclosure must provide nonunion employees with sufficient information so as to enable them to make an intelligent choice), and *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1497 (N.D. Cal. 1992) (union must "provide enough information to nonmembers so that they may understand the charges and then reasonably challenge the basis of the fair share").

I.

THE ROLE OF THE INDEPENDENT AUDITOR

The Court explained in *Hudson* that "practical reasons" preclude "'[a]bsolute precision' in the calculation of the charge to nonmembers" and thus "cannot be 'expected or required.'" *Hudson* 475 U.S. at 307, n.18. Moreover, the Court held that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures." *Id.* Nonetheless, the Court decreed that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Id.*

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[1] The standards for resolution of a matter on summary judgment are well-known and need not be repeated here. *See, e.g., Clark v. County of Placer*, 923 F. Supp. 1278, 1281-82, (E.D. Cal. 1996).

Clearly the Court's footnote recognizing "practical considerations," abjuring "absolute precision," but requiring the "verification by an independent auditor" raises more questions than it answers. Thus, unanswered are the level of verification short of absolute precision required, whether the verification, although it must be performed by an independent auditor, must be in the form of an audit, and whether what must be verified is the breakdown between chargeable versus nonchargeable expenses.

A. VERIFICATION OF ALLOCATIONS

In its prior order this court rejected plaintiffs' contention that the independent auditor must verify the allocation between chargeable and nonchargeable expenditures within each major expense category. *See Prescott*, 915 F. Supp. at 1087. At oral argument on this motion, counsel for plaintiffs' counsel asserted that the auditor's function is to provide a verification of the expenditures such that the Union, and the nonmembers, can confirm that those expenditures which the Union claims are nonchargeable are actually spent on those matters which the Union characterizes as nonchargeable. Accordingly, the court affirms its prior order that the auditor need not verify the allocation between the chargeable and nonchargeable expenditures within each major expense category. Below in addressing the question of what level of "verification" is required under *Hudson* the court will further consider the auditor's role in the process.

B. THE MEANING OF "VERIFICATION"

The parties agree that the Union's accountant performed a "review" of PEU's books rather than an "audit." The dispute is whether such a review satisfies the requirement for "verification by an independent auditor." To resolve the dispute, the court applies its understanding of *Hudson* to the evidence adduced by the parties in connection with this motion.[2]

Defendants acknowledge that their accountant's review of PEU's financial statements did not constitute a "verification by an independent auditor. . . [w]ithin the meaning of the accounting profession. . . ." Charles A. Luther Depo. At 81.[3] Plaintiffs argue that by using the term "auditor" the Supreme Court mandated that the person performing the "verification" must perform an audit as that term is defined by the accounting profession.

Plaintiffs' argument confuses the question of who must perform, "an independent auditor," with what must be performed, disclosure and verification of "the major categories of expenses." Both parties agree that an "auditor can be an accountant," and that an accountant can perform both reviews and audits. Put simply then, an independent auditor could be either an accountant performing a review, or an accountant performing an audit. Thus, the High Court's use of the term "independent auditor" does not command an audit.

Yet a second reason suggests that the professions' understanding of the phrase is not dispositive. Nothing in *Hudson* suggests either that the Supreme Court was aware of the meaning attributed to the phrase by the accounting profession, or that it intended to apply that meaning.[4] Rather, reading the phrase in the context employed by the High Court suggests something quite different than the elaborate procedures contemplated by the profession.[5] Concluding that the phrase employed by the court is not self-defining, I turn to the Court's explanation the purpose of verification.

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[2] At oral argument, both counsel assured the court that the case could be resolved on summary judgment based upon the record now before me. While the court believes that a full trial would be helpful, particularly in relation to the duties of accountants, the parties' position weighs heavily against the court's insisting on trial.

[3] Luther, the Union's accountant testified that the phrase "verification by an independent auditor" within the accounting profession "deals with the preparation of some form of audited statement." Luther Depo. at 81. Plaintiffs' expert puts it that "[o]ne such level of service [provided by an accountant] includes functioning as an 'independent auditor.'" *See* Decl. of Irving B. Ross at ¶ 12.

The Supreme Court explained that the purposed of verification is to permit the nonmember an opportunity to make an informed choice of whether to challenge the basis for the fee. Accordingly, the Court merely required that unions provide an explanation of the major categories and that those categories be verified.[6] As this court understands the evidence before it, a review satisfies the "categorical" verification and an audit (at whatever level) while providing greater assurance concerning the expenditures reported, does not provide additional information regarding the classification of expenses in the financial statements.

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[4] Indeed, the language employed by the Court suggests that it was not speaking in the language of accountants. As one declaration puts it, "[p]rofessional reporting standards utilized by accountants do not use the term 'verification.' CPAs provide compilation, review, audit, or attestation services and, as a result of the services, provide reports or opinions." Decl. of John D. Moyle, at ¶ 8.

[5] Plaintiffs' leap from who to what is shared by most reported cases. Nonetheless, even requiring an audit does not resolve the question of the scope of the task, given the variety of audit types existing within the accounting profession. *See Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 681 (6th Cir. 1989) (Auditing Standard No. 29 proper reporting mechanism and constitutes independent audit because it subjects financial statements to detailed testing); *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989) (auditor must perform evaluation of client's internal controls sufficient to form an opinion); *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 941, n.4 (C.D. Cal.) (modified SAS 29 audit verifying expenditures claimed actually made suffices if performed in accordance with generally accepted accounting principles) *rev'd on other grounds by* 963 F.2d 258 (9th Cir. 1992); *but see Laramie*, 784 F. Supp. at 1497 ("review" suffices).

There are also higher levels of verifications than an audit (e.g., attestation) and different levels of assurances within the auditing function. *See* Ross Decl. at ¶ 12 (an "attestation" is an "extension of the generally accepted auditing standards."); *see also* Luther Depo at 72 (noting that the American Institute of Certified Accountants has set forth 66 different auditing standards).

[6] This court has no doubt that dicta in its previous opinion has added to the confusion. There, in rejecting plaintiffs' contention that the auditor must verify that

Plaintiffs' expert explains that an accountant performs an audit to express a "conclusion about the reliability of a written assertion that is made by another party[.]" *See* Ross Decl. at ¶ 12. An audit "is concerned with whether the recorded information properly reflects the economic events that occurred during the accounting period." *Id.* at ¶¶ 12, 14, 16.[7] In contrast, an accounting review is "the process of recording, classifying and summarizing economic events in a logical manner for the purpose of providing financial information." *Id.* at ¶ 14.[8] Defendants' expert, John D. Moyle, agrees that an audit tests evidentiary matter to provide a reasonable assurance that records are

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the allocation of expenditures between chargeable and nonchargeable categories, I opined that the role of the auditor is to "ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Prescott*, 915 F. Supp. at 1087 (quoting *Laramie*, 784 F. Supp. at 1497). This court's previous opinion, while citing to various Circuit Court opinions, failed to address the more modest purpose articulated in *Hudson* itself. To the extent the previous dicta conflicts with this opinion, the court must disavow it.

[7] The techniques employed during an audit "include a study and evaluation of the client's internal accounting controls, tests of accounting records, and the obtaining of corroborating evidential matter through inspection, observation and confirmation." *See* Ross Decl. at ¶ 12.

[8] These descriptions are corroborated by plaintiffs' experts' citation to various accounting texts which describe auditing as a function which provides a verification of financial data by testing the validity of the data, as opposed to the acceptability of its presentation. *See* Suppl. Ross Decl. at ¶ 8 (citing Alvin A. Arens, et. al., *Auditing, An Integrated Approach* (5th ed.); Kell, Boynton, & Ziegler, *Modern Auditing* (3rd ed.), Chapter 2, p. 46).

accurate, while a review assesses whether the material is presented according to accepted classifications. *See, supra*, n.6.[9]

PEU's accountant's explanation of the auditing and review functions confirms the distinctions highlighted above. Luther testified that the difference between a review and an audit is that an audit would normally include the observation of physical inventory and analysis of documents, *see* Luther Depo. at 12-13, while a review would involve discussions with personnel and analysis of documents to insure that the expenditures were properly classified. *Id.* at 24-26.[10] Although Luther asserts that PEU's final review statement reflected changes made to the information as provided by the client, *id.* at 63, his description of those changes demonstrates that they revolved around classification of statements.[11]

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[9] Moyle further explains that an "auditor performs tests of the accounting systems and records to obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding whether the financial statements, are, in all material respects, fairly presented in accordance with GAAP." *See* Moyle Decl. at ¶ 12. In the next paragraph of his declaration, Moyle states that the purpose of an auditor's opinion is to provide "reasonable assurance". *Id.* at ¶ 13. This purpose indicates that the focus of the audit is on testing the reliability of the records. In contrast, Moyle explains that the review is limited to "negative assurances" that nothing came to the CPA's attention that would indicate that the management's assertions are not presented in accordance with the established criteria. *Id.* at ¶ 16. Since a review is based on "negative assurances," it will approve of the financial statements so long as they are presented according to accepted classifications; there will be no independent verification that the presentation is an accurate reflection of reality.

[10] Luther testified that he received expenditures information, receipts, and specific coding to asset or liability categories from PEU. *See* Luther Depo. at 55. He then produced a ledger which contained a separate account for each category of assets, liabilities, and equity. *Id.* at 37-38. Luther explains that the categories he created do not necessarily reflect the internal accounting system of the union, but are similar to it. *Id.* at 41. Luther's working documents were based on information and documentation provided by the client, and sometimes information specifically requested by the accountant. *Id.* at ¶¶ 46, 48.

Defendants contend that a review is sufficient under *Hudson* given that under accounting standards the fair presentation of financial statements is the responsibility of the entities' management. Moyle Decl. at ¶ 10. Once again, it is unclear to the court why accounting standards should govern. Nevertheless, the contention is consistent with *Hudson*'s requirement that the Union provide the categories of expenditure with the independent auditor verifying them.[12] Moreover, a conclusion that a review satisfies *Hudson* is consistent with its emphasis on practicalities. *See Hudson*, 475 U.S. at 307, n.18. In his deposition, PEU's accountant estimates that he billed PEU between $2,500 and $3,000 for the reviewed financial statement for the 1994 year. *See* Luther Depo. at 20. Based on his personal experience, Luther testified that an audit covering the same scope as the review would costs between $12,000 and $15,000. *Id.* at 22 & 74. He also testified that it would cost as much as $45,000 to do an audit of all units. *Id.*

While to say the least the matter is not free from doubt, the court concludes on the basis of the above considerations that a review satisfies the *Hudson* purpose. Accordingly, no higher verification is required, although it may be desirable.[13] Accordingly, summary judgment will be entered on behalf of defendants as to this claim.

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[11] For example, Luther testified that if he came across a check during a review which appeared to be submitted by the client in the wrong category, he would normally recommend that it be reclassified into the proper category. *See* Luther Depo. at 50. Luther then testified that if the client refused to reclassify, and if the failure was material, he might not issue the review. *Id.* at 50-51.

[12] As this court understands the evidence, a review verifies the classifications made by the union. The ordinary meaning of "classification" is "the act or a method of distributing into groups, classes, or families: an assigning to a proper class." The ordinary meaning of "classify" is "to group or segregate in classes that have systematic relations usu. founded on common properties or characters: sort." *See* Webster's Dictionary, at 417, col. 1. Thus, the act of classifying, the process being verified by a review, appears to be what the High Court required the union to provide verification of through an independent auditor.

II.
SUFFICIENCY OF THE ESCROW

The court in its previous order explained why it believed that plaintiffs' challenge to the escrow amount does not lie. Plaintiff challenges that explanation on the basis that the court has failed to apply rigorous First Amendment standards. As I explained there, however, the language of the First Amendment hardly commands any of the procedures developed in *Hudson*. Rather, the procedures mandated by the Supreme Court must be viewed as providing a prophylactic border surrounding First Amendment values. As such, however, they must be balanced against the competing interests of fairness and labor peace embodied in the agency shop. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 218 (1977). In resolving these competing values the High Court requires unions to escrow "the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. In the matter at bar, this court continues to find that plaintiffs have not demonstrated that an amount greater than 4% is in dispute. Accordingly, injunctive relief will not be granted, and defendants' motion for summary judgment will be granted.[14]

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[13] It must be kept in mind that what is being considered is constitutional minima, and not what might be the most efficacious process. Although aspects of *Hudson* may suggest otherwise, neither this court, nor the Supreme Court for that matter, is in the business of legislating.

[14] The court wishes to emphasize that it is not finding that 4% in fact represents the amount of nonchargeable expenditures. Indeed, defendants' counsel's acknowledgment during oral argument that the union did not keep records of the labor and expenditures involved for many of its political activities raises substantial questions as to the manner of determining the escrow figure. The issue, however, is what is in contention, and in that regard the evidence does not demonstrate that more than 4% is in contention.

III.
LOCAL UNION PRESUMPTION

In its preliminary injunction order the court relied on the local union presumption. Plaintiffs claim that the decisions cited by the court to support the local union presumption have been superseded. *See Lowary v. Lexington Local Bd. of Educ.* ("*Lowary II*"), 903 F.2d 422, 430 (6th Cir. 1990), *superseding Gillespie v. Willard City Board of Education*, 700 F. Supp. 898, 903 (N.D. Ohio 1987); *Hohe v. Casey*, 956 F.2d at 399, 409-11 (3rd Cir. 1992), *superseding Hohe v. Casey*, 695 F. Supp. 814, 819 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3rd Cir. 1989), *cert. denied*, 493 U.S. 848 (1989). Plaintiffs also contend that *Tierney v. City of Toledo*, 917 F.2d 927, 937 (6th Cir. 1990) rejects the local union presumption. They then contend that this court should follow suit. For the reasons explained below, the court declines to do so.

The *Tierney* decision is inapposite. There, the Sixth Circuit addressed the failure of a local union to explain how the dues paid to the international union were spent. Here, plaintiffs challenge the Union's alleged failure to account for the expenditures of its local affiliates. Thus, the reluctance to invoke a presumption in *Tierney* makes sense for the same reason that the efficiency of invoking it here also makes sense: the local union is presumed to spend less on nonrepresentational activities. Moreover, since *Hudson* specifically required local unions to account for their payments to state and national labor organizations, *see Hudson*, 475 U.S. at 307, n.18, the Sixth Circuit had no choice but to invalidate the notice.

Lowary II is also inapposite. As this court observed in the preliminary injunction opinion, *Lowary II* rejected the presumption in the context of an arbitration hearing. Since in an arbitration, "the nonmember's burden is simply to make his objection known," *see Lowary II*, 903 F.2d at 431, it was impermissible to place an additional burden on the nonmember, during arbitration, to rebut a presumption that the union spent its money properly. *Id.* Unlike an arbitration, the presumption here does not affect the nonmembers' ability to prevail at arbitration, nor would it appear to affect his or her ability to make a decision as to whether to challenge the fee.

Plaintiff is correct about the Third Circuit's rejection of the local union presumption. *See Hohe v. Casey*, 956 F.2d at 409-11. Even if *Hohe* were binding, however, it would not be dispositive under the facts at bar. *Hohe* did not categorically reject the local union presumption; rather, it held that the union could not assume that local expenditures mirrored state expenditures when the notice itself offered no reason or explanation of why such an assumption was justified. *Id.* at 410. The *Hohe* court specifically noted that while nonmembers of the local received only information about the parent union's expenditures, they were not informed of the percentage of their local dues which went to the parent union.

In contrast to *Hohe*, the nonmembers here are told (rightly or wrongly) that all their dues go to PEU. Moreover, the figures presented in the budget provide a good explanation of why the presumption is justified. The notice indicates that $56,544.00 of PEU's $2,626,954 budge goes to "Unit Funds." This amounts to 2.15% of the budget. Since there are 40 local units, EDCEA receives $1,413.60 (0.05% of PEU's budget). As a practical matter, there does not seem to be a high likelihood that EDCEA (or any other local affiliate) would spend a higher percentage of $1,413.60 on political activities than PEU would spend of its $2.5 million. Thus, unlike *Hohe*, the Union offers some reason why nonmembers in the local union can rely on PEU's books for a breakdown of their dues.

For the reasons discussed in the preliminary injunction order, the court still concludes that the local union presumption is appropriate and permissible under *Hudson*. *See Lucid v. City and County of San Francisco*, 774 F. Supp. 1234, 1237 (N.D. Cal. 1991) ("No authority requires such a breakdown [of expenses incurred on a bargaining unit basis] and we decline to extend existing law to create one. Requiring such a breakdown may be extremely impracticable, if not impossible, as well as unduly burdensome."); *see also Andrews v. Education Association of Chesire*, 653 F. Supp. 1373, 1377-78 (D.Conn. 1987) (without presumption, unions would be put to "the potentially prohibitive cost" of proving the individual percentages of a very large number of affiliates), *aff'd as modified on other grounds*, 829 F.2d 335, 338-339 & n.1 (2d Cir. 1987). Accordingly, summary judgment will be entered on behalf of defendants on this claim.

IV.

FAIR SHARE FEE PROCEDURES

In the prior order, the court preliminary enjoined the Union from collecting a fair share agency fee until it provided a challenge procedure which allows for the dispute to be resolved within 120 days from the date on which the disputed fee is seized from the nonmembers' paycheck. The court also ruled that the "under penalty of perjury" and specificity requirements, removed by the Union's January 10, 1996 letter, must not be re-imposed on nonmembers. Defendants now argue that the court should dissolve these order because it has continued to abide by its January 10, 1996 letter and has also voluntarily instituted a procedure which allows dissenting nonmembers to make challenges within sixty days.

The court will not dissolve the injunction. Voluntary cessation of illegal conduct does not moot a case because defendant would otherwise be free to return to its old ways. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Accordingly, the injunction will remain permanent.

V.

INDEMNIFICATION CLAUSE

Plaintiffs assert that the hold harmless agreement between the Union and the district is void as being against public policy and that this court should so declare. The assertion raises a number of subtle and that difficult questions, *viz*, is this a question of federal law since it arises in the context of procedures mandated by the Supreme Court as implementing First Amendment rights, or state law since a California contract is in issue; in either event, how is public policy to be discovered, i.e. if federal law, is it a matter of federal common law requiring an examination of the common law as it stood at the time of the adoption of § 1983, *see, e.g., Pierson v. Rhay*, 386 U.S. 367 (1951) (§ 1981 applied against the backdrop of tort law at the time of its adoption), or if state law what doctrines of state public policy are in issue.

I begin by noting that neither party has briefed the difficult issues underlying resolution of this aspect of plaintiffs' claim, but instead rely on circuit cases, which also do not address these questions, but in any event reached opposite results. *See Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992) (agreement to hold public employer harmless does not violate public policy); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992) (hold harmless agreement does violate public policy). Happily, it is this court's view that those question need not be reached, since plaintiffs have failed to show that they have standing to raise the issue.

Plaintiffs seeking declaratory relief must demonstrate standing to raise the question. Standing requires a showing that plaintiff has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Scott v. Rosenberg*, 702 F.2d. 1263, 1267 (9th Cir. 1993). Second, "that the injury can be fairly traced to the challenged action, [and third, that it] is likely to be redressed by a favorable decision." *Id.* (quoting *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 38 (1976)); *see also Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403, (9th Cir. 1985).

It seems relatively clear to this court that plaintiffs have not demonstrated any of the three prerequisites to standing.[15] While it may be that plaintiffs have suffered a violation of the standards enunciated in *Hudson*, that injury is the result of the Union's conduct, and is traceable to the hold harmless agreement in only the most indirect fashion. Such indirect injury is insufficient. *Eastern Kentucky*, 426 U.S. at 40. As the Ninth Circuit has observed, the mere assertion that the employer "felt freer" to shirk its duty to its employees is insufficient, without more, to establish an injury. *Knight v. Kenai Peninsula Borough School District*, ___ F.3d ___, 1997 WL 751724, at *7 (9th Cir. 1997). Having concluded that plaintiffs lack standing to raise the issue of the lawfulness of the hold harmless agreement, the court cannot reach the issue. Accordingly, summary judgment as to this claim must be entered on behalf of defendants.

---

[15] Relative clarity suffices. As the Supreme Court explained, resolution of standing issues tends to be a question of degree rather than kind, i.e., identifying a point on a continuum, and thus determinations of standing are "not susceptible of precise definition." *Allen v. Wright*, 468 U.S. 737 (1984).

VI.

RESTITUTION

Plaintiffs request complete restitution of all agency fees collected under the constitutionally deficient procedures. The request appears overly ambitious. The Supreme Court has held that restitution under § 1983 need not be more expansive than compensatory damages for it to fulfill the deterrent effect that Congress intended. *Carey v. Piphus*, 435 U.S. 247, 256-57 (1978) (cited in *Lowary II*, 903 F.2d at 433). "Although some undetermined part of these fees was unconstitutionally seized, plaintiffs would be 'free riders' to the extent that plaintiffs were allowed to recover their validly-chargeable expenses." *Lowary II*, 903 F.2d at 432. Morever, "awarding total restitution to plaintiffs will undermine the policy concerns of *Abood*." *Id.* at 432-33. As the Sixth Circuit observed, the proper remedy for an unconstitutional fee collection under *Hudson* is not the refund of the total fee, but the refund of that portion which was not spent on chargeable activities. *Id.* at 433 (citing *Hudson* and *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)).

While plaintiffs have submitted evidence suggesting that they were charged amounts in excess of the Union's representational costs, it is unclear from the record whether and how much of a refund is appropriate. Given that the appropriate forum for resolution of the issue is the challenge procedure mandated by *Hudson*, the court will defer to that process. Accordingly, summary judgment will be denied plaintiff and granted defendants as to this claim.

VII.

ORDER

For all the above reasons, the court makes the following ORDERS:

1. Defendants' motion to dissolve the preliminary injunction is DENIED and the injunction is made permanent; and

2. The cross-motions for summary judgment are GRANTED and DENIED as provided above.

IT IS SO ORDERED.

DATED: January 23, 1998.

/s/
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

APPENDIX D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

25 June 1999

[Clerk's Stamp Omitted in Printing]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL L. JONES; KAREN PIERCE; CHRISTINE M. TURNEY, Plaintiffs-Appellants, v. COUNTY OF EL DORADO; KATHY LIBICKI; LOCAL 1 EL DORADO COUNTY EMPLOYEES ASSOCIATION, Defendants-Appellees.	No. 98-15579 D.C. No. CV-95-01859-LKK ORDER DENYING PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC

Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER[16], District Judge.

The panel has unanimously voted to deny the appellants' petition for rehearing. The suggestion for rehearing en banc was circulated to the judges of the court, and no judge requested a vote for en banc consideration.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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[16] Honorable Charles R. Weiner, Senior United States District Judge for Eastern Pennsylvania, sitting by designation.

APPENDIX E

UNITED STATES CONSTITUTION
Article III

UNITED STATES CONSTITUTION
Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish....

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States....

APPENDIX F

UNITED STATES CONSTITUTION
First Amendment

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

Congress shall make no law ... abridging the freedom of speech; ... or the right of the people peaceably to assemble; and to petition the Government for a redress of grievances.

APPENDIX G

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

Section 1. .... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 1999)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 1999)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

APPENDIX I

MEYERS-MILIAS BROWN ACT
Cal. Gov't Code § 3502.5(a)

MEYERS-MILIAS BROWN ACT
Cal. Gov't Code § 3502.5(a)

... an agency shop agreement may be negotiated between a public agency and a recognized public employee organization which has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first....

2

No. 99-519

In the

Supreme Court of the United States

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE and CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; KATHY LIBICKI and EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Michael W. Roman
1816 Fifth Street
Berkeley CA 94710
(510) 548-6211

Fred J. Hiestand*
1121 L Street
Suite 404
Sacramento, CA 95814
(916) 448-5100

Attorneys for Respondents

* *Counsel of Record*

156341

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Calvin Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members* — Much A-Dues About Nothing?, 60 *Fordham L. Rev.* 1057 (1992) 8

The petition for certiorari presents an incomplete and misleading analysis of similar holdings by the Court of Appeals and District Court on the issue of petitioners' want of standing to challenge the indemnity agreement between the public employees' union and the public employer, and overstates the importance of these holdings to anyone besides the parties. As described herein, certiorari should be denied in this case because:

(1) The decisions of the Court of Appeals and District Court holding that petitioners' lack standing to challenge the indemnification agreement between the public employee union and the employer are correct;

(2) The alleged conflict between the circuits on the validity of indemnification agreements between public employers and unions are not true conflicts, but ones based upon incomplete analyses and peculiarities of those cases; and

(3) To the extent there is an apparent conflict on the validity of indemnification agreements between the circuits, the issue of their validity requires further study by the lower courts before it is addressed by this Court.

STATEMENT OF THE CASE

Petitioners are nonunion agency fee payers who filed a federal civil rights action contesting the adequacy of the union's notice to them under *Chicago Teacher's Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). The gravamen of their complaint is that the respondents' notice did not comply with the requirements of *Hudson*; specifically, that though respondent union "did give a rather detailed notice and a goodly amount of explanation of the fee to the nonmember fee payers," (App. 6a) the financial statement accompanying the notice was not properly *verified*.

The district court found that financial review by an accountant, which is what respondents provided in their notice to petitioners, was adequate to satisfy the requirements of *Hudson*, but the court of appeals reversed stating "that what is required is a real independent verification of the financial data in question." (*Id.* at 8a.) Accordingly, respondent Public Employees Union, Local No. 1 (PEU), has since prepared a verified financial audit of "chargeable" versus "non-chargeable" expenses for the current year and included it with an amended notice served on petitioners.[1] Respondent union has also refunded to petitioners all of the agency fees collected from them for the time period covered by their complaint — i.e., from May 1995 to the present. This total amount was about $3000. (*Id.*)

---

[1] Defendants' Memorandum of Points and Authorities in Opposition to the Motion for Preliminary Injunction, filed October 1, 1999 in U.S. District Court, E.D. Cal., No. Civ-S-95-1859, LKK and attached exhibits. See also Order of Court denying Plaintiffs' Motion for Preliminary Injunction, filed November 17, 1999.

The district court and court of appeals found against petitioners on their claims for complete restitution of their agency fees, invalidation of the escrow account procedure used by respondent union in response to a fee challenge, and the validity of the indemnification agreement between respondent union and the public employer. This last issue — the validity of the "hold harmless" agreement — was based on petitioners' lack of standing. It is in regard to these judicial decisions that petitioners state that "[t]he district court and court of appeals decided most of the [petitioners'] . . . claims and entered judgment largely in their favor, but not on the claim presented in this Petition." (Pet. 3.)

Petitioners seek review to determine the legality of the indemnification or "hold harmless" agreement between PEU and the employer, El Dorado County. They contend that this indemnification agreement is unconstitutional because it is void as against public policy. The district court opined that this issue "raises a number of subtle and difficult questions," including

> [I]s this a question of federal law since it arises in the context of procedures mandated by the Supreme Court as implementing First Amendment rights, or state law since a California contract is in issue; in either event, how is public policy to be discovered, i.e., if federal law, is it a matter of federal common law requiring an examination of the common law as it stood at the time of the adoption of § 1983, *see, e.g., Pierson v. Ray*, 386 U.S. 547 (1967) (§ 1981 applied against the backdrop of tort law at the time of its adoption), or if state law, what doctrines of state public policy are in issue? (App. 33a.)

"Happily," the court concluded, it need not decide this question because petitioners "have failed to show that they have standing to raise the issue." (App. 34a.) They lack standing, the court stated, because any injury they have suffered "is the result of the Union's conduct, and is traceable to the hold harmless agreement in only the most indirect fashion." (*Id.*) Indirect injury is, to be sure, insufficient. In reaching this result, the district court relied upon *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997), *cert. denied sub nom.*, *Anchorage Education Association v. Patterson*, 523 U.S. __, 118 S. Ct. 2060 (1998) for the proposition that petitioners' assertion that the "employer 'felt freer' to shirk its duty to its employees" because of the indemnification agreement, was "insufficient, without more, to establish an injury." (*Id.*)

Similar reasoning was invoked by the Court of Appeals to reject petitioners' standing:

> While it can be assumed that [petitioner] suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs — on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for [petitioners'] claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

(App. 16a.)

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Decision That Petitioners Lack Standing to Challenge The Indemnification Agreement Between The Public Employee Union And The Employer Is Correct Because There is No "Harm" To Them from the Agreement.

Petitioners object that the district court did not reach the merits of their attack on the hold harmless agreement between El Dorado County and PEU on the ground that petitioners lacked standing to raise it. They are particularly upset that the court did this *sua sponte*: "While respondents . . . addressed the merits of the [petitioners'] argument in their opposition . . . , and attacked the [petitioners'] claim on the merits . . . , the record in the district court is *absolutely devoid* of argument on the issue of [petitioners'] standing to raise this element of their claim." (Pet. 5-6; italics original.) "[T]he district court's determination that the [petitioners] lacked standing was made *sua sponte*, without any warning whatsoever." (*Id.* at 14.) But there is no requirement that a court abstain from reaching a standing issue if it is not raised by a party, or that it give notice to claimants that it intends to do so. To the contrary, "[a]lthough raised by neither of the parties, we are first obliged to examine the standing of appellees, as a matter of the case-or-controversy requirement associated with Art. III, to seek injunctive relief in the District Court." (*Juidice Judges v. Vail*, 430 U.S. 327, 331 (1977), *citing North Carolina v. Rice*, 404 U.S. 244 (1971); and *O'Shea v. Littleton*, 414 U.S. 488, 493-498 (1974).)

The key to the "standing" question is, of course, ascertaining whether the conduct complained of harms or sufficiently threatens to harm petitioners. (*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992).) Both the district court and court of appeals found that petitioners suffered insufficient harm to confer standing upon them to challenge the indemnity agreement between respondent public employer and the union. Petitioners nevertheless continue to contend that the species of harm they suffer is twofold: (1) the increased risk of future violations of their constitutional rights by illegal agency fee seizures in the absence of compliance with *Hudson*'s requirements; and (2) the forcing of petitioners to subsidize the public employer's defense against their meritorious lawsuit to vindicate their constitutional rights for violations that already have occurred.

Neither sort of injury is palpable; both are, as the courts below found, "speculative." As to the first supposed injury — the increased risk of future violations of petitioners' constitutional rights — the record shows that respondent union promptly complied with the Court of Appeal's ruling that it needed to obtain a verified audit of chargeable versus non-chargeable expenses, refunded all of petitioners' agency fees collected during the time period at issue, and modified its notice to agency fee payers to assure that it was in conformity with *Hudson*'s requirements as delineated by the appellate court's opinion. (*See ante* ~~at~~ n.1.)[2] This is not the conduct of a scofflaw that evinces a present or likely threatened future injury to petitioners' First Amendment rights. And the argument that petitioners will, unless the indemnification agreement is struck down, be "compelled to subsidize the public employers' defense against their meritorious lawsuit" (Pet. 9-10) assumes facts not yet in evidence. Specifically, it assumes that the union's defense of the employer's liability to petitioners for the agency fee dispute is not properly "chargeable;" and that whether it is or not, respondent union has "charged" or will charge petitioners for that defense. Since petitioners have been refunded all of their agency fees up to the present, and have not filed any new challenges to the respondents' agency fee practices, it is difficult to imagine how they could claim they have or will be "charged" for this expense. Whether respondent union's defense of the employer in this action is properly chargeable to agency fee payers is a question not now before the Court; and deciding it under the guise of determining the validity of the indemnification agreement is an unusual extrapolation of judicial decision making for the Court to entertain.[3]

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[2] These facts were taken into account by the district court when it denied petitioners' motion for a preliminary injunction to enjoin respondent union from collecting agency fees. Petitioners claimed that respondent union's notice and procedural safeguards did not comply with the Ninth Circuit's opinion in this case (Order of Judge Lawrence K. Karlton, U.S. District Court, Civ. S-95-1859, dated November 17, 1999.)

Petitioners tortuously stretch language in a footnote from *Hudson*, *supra*, 475 U.S. at 307 n.20 to make the district and appellate court opinions in this case seem in conflict with this Court's holding in that case. But *Hudson*'s notation that "the government *and* union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights]" (Pet. 15, italics added.) cannot logically be equated with any disapproval by this Court of public employer–union indemnification agreements, especially since no indemnification agreement was at issue in *Hudson*. Nor do the remarks in *Lehnert v. Ferris Facult Ass'n*, 500 U.S. 507, 531 (1991) that disapprove of charging objecting nonmembers for "the expenses incident to [an illegal] strike" have any relevance to the challenged indemnification agreement. (Pet. 17.) The two happenings — an illegal strike and an indemnification agreement — are not analogous. Any supposed equation of the two becomes even more problematic given that *Lehnert* also held that *all* strike preparation expenses are properly "chargeable," even if the anticipated strike would be illegal. "The Court reasoned that strike preparation activity is 'an effective bargaining tool' and thus germane to collective bargaining activities." (Calvin Siemer, *Lehnert v. Ferris Faculty Association: Accounting to Financial Core Members* — Much A-Dues About Nothing?, 60 *FORDHAM L. REV.* 1057, 1073 (1992).) Certainly if preparation for an illegal strike is "chargeable," and thus not "harmful" to objecting agency fee payers, it is difficult to imagine why defense of a "hold harmless" agreement could logically be found to be injurious to petitioners.

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[3] It is well-settled that "the expenses of litigation incident to negotiating and administering the [collective bargaining] contract or to settling grievances and disputes arising in the bargaining unit are clearly chargeable to petitioners as a normal incident of the duties of the exclusive representative." (*Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984).) Petitioners herein seek to bootstrap the question of whether the litigation expenses incurred in the defense of their lawsuit by respondent union are properly "chargeable" to the issue of the indemnification agreement's validity. But the issue of whether these expenses are properly "chargeable" is best left to the district court after development of a record that does not now exist on this question.

No, petitioners lack standing because they cannot show an injury sufficient to satisfy its strictures. Only three of the eight cases cited by petitioners that address the validity of public employer-union indemnification agreements mention standing. Two of these are the appellate and district court opinions in this case which explicitly discuss and analyze the standing issue; the other is *Hohe v. Casey*, 956 F.2d 399, 411 (3rd Cir. 1992), which stated only that the plaintiff agency fee payers advanced a theory that "raises a cognizable legal issue." This, as the Court of Appeals in this case noted, was a "suggestion" that there was standing, not a decision on the issue. (App. 17a, fn.7). Significantly, *Hohe* upheld the validity of the indemnification agreement because "even if [the union] would indemnify the [public employer] for such costs and fees under the [agreement], we do not believe that this should matter."

> Nonmembers will be able to collect costs and fees. Moreover, the exclusive representative, upon whom most obligations fall, has a significant incentive to ensure that its procedures comply with the Constitution. Failure to do so may result in its being unable to retain a portion of the fair share fee. Thus, we hold that the invalidation of the indemnification clause is not required by the First Amendment.

(*Id.* at 412.) In other words, "no harm, no foul."

Petitioners concede that the conclusion by the court in *Hohe* about the lack of harm flowing from the indemnification agreement to the agency fee paying challengers "is a virtually explicit reference to the second of the three requirements necessary to establish 'standing,' *i.e.*, that 'there must be a causal connection between the injury and the conduct complained of — the injury has to be fairly . . . trace[able] to the challenged action of the defendant.' " (Pet. 20.) *Hohe* is, then, ultimately consistent with the opinions in this case on the critical point: there is no injury that can be shown to befall petitioners from the existence of the indemnification agreement.[4]

Now, the remaining five opinions cited by petitioners invalidate the indemnification agreements but do not explicitly mention or discuss standing. They are not, then, "standing" decisions, and cannot be in conflict with the standing decisions in this case or with *Hohe*'s suggestion about "standing."[5] These five cases, four from the Sixth Circuit and one from the Second, reach the merits of the indemnification agreements and find them void as against public policy. Why? Because the agreements supposedly harm petitioners. How?

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[4] Perhaps the *Hohe* appellate opinion reached the merits of the indemnity agreement because the plaintiffs raised several other challenges to the agency fee payer mechanism about which they clearly possessed standing and, having reached those issues, the court understandably felt it would not have been in the interest of judicial economy to abstain from deciding the validity of the hold harmless agreement. That, after all, would most likely spawn new "spin off" litigation to resolve the undecided issue. Once *Hohe* got there on the merits, however, the analysis and conclusion that no harm can be traced from the agreement itself to petitioners can be related back to the threshold "standing" issue where it becomes obvious that a necessary element for standing is missing.

[5] Petitioners, aware that the cases going their way do not discuss "standing," nonetheless try to characterize them as opinions on "standing" by stating that they are "implicit standing" decisions. "Implicit in any federal court's merits determination is a finding that the parties before the court possess the requisite standing." (Pet. 21.) But A

> decision is not authority as to any questions of law which were not raised or presented to the court, and were not considered and decided by it, even though they were logically present in the case and might have been argued, and even though such questions, if considered by the court, would have caused a different judgment to be given.

(H. Black, *LAW OF JUDICIAL PRECEDENTS* 37 (1912).) Not surprisingly, the case law is silent about any doctrine of "implicit standing."

> The [public employer] defendants, through their indemnification agreement with [the union], have effectively destroyed the only realistic motivation an employer has to ensure an agency fee plan is constructed and administered correctly. By agreeing to indemnify the [public employer] for any constitutional deficiencies in their agency fee plan, [the union] enables them to escape liability for any action instituted by an employee challenging the validity of the agency fee plan.

(*Weaver v. Univ. of Cincinnati*, 764 F. Supp. 1241, 1247 (S.D. Ohio 1991), *aff'd in part*, 970 F.2d 1523 (6th Cir. 1992), *cert. denied sub nom*, *Weaver v. Steger*, 507 U.S. 917 (1993).)

But this supposed species of harm, which petitioners herein allege, is devastatingly dispelled by the analysis in *Hohe* and the Court of Appeals' opinion in this case. *Hohe* reasons that it simply isn't true that an indemnification agreement will tend to make the public employer shirk responsibility to his employees because "[n]on-members will be able to collect costs and fees, [and] the [union], upon whom most obligations fall, has a significant incentive to ensure that its procedures comply with the Constitution. Failure to do so may result in its being unable to retain a[6] portion of the fair share fee." *(Hohe, supra*, 956 F.2d at 412.) As the Court of Appeals herein stated:

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[6] The Court of Appeals was prescient in its observation that another powerful incentive for the union to follow constitutional procedures in collecting agency fees is that a "failure to comply may also involve the union in substantial and expensive litigation,

(Cont'd)

> The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs — on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for [petitioners'] claim that the provision will somehow cause the [public employer] to ignore its own duties. But that argument is no more than rank speculation, and any breach of the [employer's] duty can hardly be said to be traceable to the indemnification provision itself.

(177 F.3d at 1112.)

Petitioners even try to create an apparent conflict within the Ninth Circuit on the standing issue by telling us that *Knight v. Kenai Peninsula Borough School District*, *supra,* 131 F.3d at 807 is a "standing" case, or at least can be viewed through petitioners' prism as a standing case. It is not, and no rational view can yield that result. *Knight* relied upon the doctrine of "ripeness" to decline to reach the issue of the validity of the indemnification provision.[7] In doing so it

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(Cont'd)
witness this case which has been in progress for over three years and will not be over for some time yet." (*Prescott*, App. 17a.) Petitioners' motion for attorney fees and costs for the appeal alone seeks over $37,000. (Petition for Attorneys' Fees and Expenses on Appeal, *Prescott v. County of El Dorado*, 9th Cir. No. 98-15579, filed on or about July 12, 1999.)

[7] There is, to be sure, a close relationship between the questions of ripeness and mootness and the constitutional dimensions of the standing question. *See Warth v. Seldin* (1975) 422 U.S. 490, 499 n.10.

stated, in language remarkably similar to the requirement for "standing," that petitioners' "argument is that [defendant public agency] will feel freer to violate the constitutional rights of nonmember[s] . . . due to the indemnification clause." (*Id.* at 814.) This is also petitioners' argument as to why the indemnification clause in the instant case should be voided. (Pet. 11.) *Knight* declined to reach that argument, however, because it "contains factual assertions that cannot be assessed on the current record." (*Id.*) That reason echoes the district court's and court of appeals' views in this case that petitioners failed to make a "showing that [they have] personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." (App. 34a.)

Further, *Knight* explicitly rejects the underlying premise of petitioners' attack on the indemnity clause: that the County has a duty to its employees to assure that the notice sent to nonmember agency fee payers passes constitutional muster before it is sent. That contention was made by petitioners in the district court against a public school district, and the court bought it; but *Knight* reversed on this precise point:

> We are not persuaded that the [public employer] owes a duty of reasonable review of [the union's] *Hudson* notice before the notice is mailed. The notice is mailed directly from the [union] to the nonmembers, and the [employer] does not get involved until [the union] seeks to force a nonmember to pay a representation fee. This necessarily occurs at a substantially later time. At that later stage, the [employer] cannot take adverse action against the nonmember employee without first ensuring that the nonmember's

> constitutional rights were not violated by [the union]. [¶] Therefore, we hold that the [employer's] duty to nonmembers is to evaluate the sufficiency of the union's notice at the time the union seeks to take action against a nonmember for failure to pay the agency fee, and not at the time of the initial mailing of the *Hudson* notice.

(131 F.3d at 817.)

Thus *Knight* undercuts petitioners' premise that the indemnity clause is void as against public policy because it works against the County exercising its duty to its employees to make sure that the union's notice is not constitutionally infirm. It also corroborates the view of the Court of Appeals herein that petitioners, if they seek standing to challenge the indemnity agreement, must show that they have actually suffered some real or threatened injury as a result of the agreement. It is impossible to show any injury if the County does not, consistent with *Knight*, owe any *duty* to the nonmember agency fee payer at the stage the notice is sent to them by the union.

II. The Apparent Conflicts Between the Circuits on the Validity of Indemnification Agreements Between Public Employers and Unions Are Resolvable When The Decisions are Placed in Proper Context.

Petitioners would have the Court believe that true conflicts of great importance to the public exist between the circuits on the validity of public employer-union "hold harmless" agreements. Examination of these cases, however, reveals that these conflicts are more apparent than real and can be resolved or reconciled when placed in the proper jurisprudential context.

A basic starting point for contextual analysis of these cases is the nature of the agency fee amount as a subject of bargaining. Bargaining subjects are either mandatory or permissive depending on the nature of the issue. (*See NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).) See generally *Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971).) The amount of the agency fee is not a mandatory subject of bargaining. "The amount of an agency fee concerns primarily the relationship between the union and the nonmember employees; it is not 'an aspect of the relationship between the employer and employees' . . . [and therefore] . . . is not a mandatory subject of bargaining. . . ." (*North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).)[8] Because this bargaining subject is not mandatory, the union is not required to disclose to the employer the financial information upon which the agency fee is based during bargaining and formulation of the agreement. (*Id.* at 479.) It follows that the employer deprived of the information under these conditions should be allowed to protect itself through a valid hold harmless provision in the final agreement. The courts have not yet addressed whether a hold harmless provision is essential under these circumstances. *Weaver* did not consider *North Bay* when holding that hold harmless clauses were *per se* violative of public policy when applied to agency fee situations (*Weaver v. University of*

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[8] The D.C. Circuit first established that agency fees were not a mandatory subject of bargaining in 1982. *See International Union of the United Ass'n of Journeymen of Plumbing Indus. v. NLRB*, 675 F.2d 1257 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

Cincinnati, *supra*, 970 F.2d 1523), and consideration of that fact could (and should) lead to validation of indemnity agreements.[9]

In a context similar to the decision in *North Bay*, the First Circuit held that an employer could rely on the union to carry out its duty to the employee. (*Carrol v. Brotherhood of R.R. Trainmen*, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970).) The court explained that to prohibit the employer from relying on the union would require that in order "[t]o protect itself from . . . liability . . . an employer would be forced to ignore union representations and take the initiative in dealing with employees whenever it suspect[ed] a discriminatory motive. Such conduct would . . . have a . . . detrimental effect on labor-management relations. . . ."[10]

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[9] The nonmember employee is protected, regardless of the lack of involvement by the employer, precisely because the courts have required the union to provide the employees with professionally audited financial information concerning the deduction of agency fees directly before the deduction is made. (*Hudson*, *supra*, 475 U.S. at 307 n.18.) Therefore, the union and employer usually agree that the primary duty to enforce the nonmember's rights lies with the union, and that hold harmless clauses between the union and the employer may not only be valid, but necessary given these circumstances.

[10] Charles A. Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 *LABOR L.J.* 686, 687 (1976) (*citing Carroll v. Brotherhood of R.R. Trainmen*, *supra*, 417 F.2d at 1028 and describing the harm of holding the employer responsible for inadvertent participation in the union's discriminatory practice against an employee in an unfair representation case).

Accordingly, a possible consequence of voiding hold harmless provisions as petitioners urge, although allowing the union to withhold information concerning the fairness of pay deductions, would be the weakening of the framework upon which union-management relations are based.[11] Under these circumstances, the union would no longer operate as the sole representative of the employees because the employer would now be directly responsible for nonmember employees. The employer would be required to establish independently, and upon its own initiative, that the fees being deducted were fair to the nonmember. This may require the employer to obtain the services of an additional independent auditor to verify the fairness of the fees. (*See Hudson, supra*, 475 U.S. at 307 n.18.) Not only does this requirement create an insurmountable burden for the employer,[12] but also jeopardizes the constitutionality of the security arrangement. That is because the Court has found that a nonmember's rights are not violated when that employee is forced to pay his fair share of the union costs of bargaining. (*Id.*) However, should the bargaining relationship change so that the employer is charged with the duty and cost of representing the nonmember employee in the bargaining process independently, the deduction of the agency fee for this service would be constitutionally questionable. Under this scenario, the union has allowed the duty of nonmember bargaining to be shifted to the employer, and therefore, should no longer be allowed to collect bargaining fees from the nonmember.[13]

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[11] A judicial pronouncement holding the employer liable for the accuracy of information provided to it by the union has been likened to a Damoclean sword hanging over the entire employment relationship. Edwards, *supra*, n.7, at 687.

[12] The employer is not privy to all financial information held by the union and, even with an auditor, is likely to have an incomplete set of figures upon which to base the accuracy of the agency fee deduction. Only "the unions possess the facts and records from which . . . expenditures can reasonably be calculated. . . ." (*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 239-40 n.40 (1977).)

To avoid a potential conflict in the employment relationship, the court in *North Bay* found an inherent protection to the employer, similar to one expressly agreed to in a hold harmless provision, in situations in which the union is allowed to withhold agency fee information from the employer. (*North Bay Dev. Disabilities Servs., Inc. v. NLRB*, *supra*, 905 F.2d at 479).) "The Employer in this case voice[d] the concern that it might be charged with an unfair labor practice if it with[held] excessive fees" in reliance on the union-provided amount to be withheld. However, the court concluded that "[t]his apprehension . . . appear[ed] . . . to be unfounded" when the employer had no reason to believe that the fee was unlawful. (*Id.*) The court emphasized that the employer is protected from charges of unfair labor practices when it relies on the agency fee deduction that is provided by the union, and therefore, would not have to initiate its own procedure for guaranteeing the accuracy of the fee.[14] (*Id.*)

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[13] *See Abood*, *supra*, 431 U.S. at 232; *see also Hudson*, *supra*, 475 U.S. at 293. The Court explained in these cases that deducting fees from a nonmember's pay is only constitutional when the fees deducted are proportionate to the benefits derived from the union's bargaining for the nonmember and administering the contract.

[14] To be sure, the existence of this protection does not completely relieve the employer of its duty to the nonmember employee. (*See H.C. Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201-02 (9th Cir. 1977) (suggesting that the employer cannot

(Cont'd)

Circuit courts have further justified the use of hold harmless clauses between the union and the employer because insurance policies, which are analogous in purpose to indemnity agreements, are not violative of public policy. The fact that public policy dictates that coverage be excluded when an employer intentionally acts in violation of an employee's rights, serves as a deterrent to any incentive the employer may have to violate its duty to the employee. (*See Solo Cup*, *supra*, 619 F.2d at 1187; *Union Camp*, *supra*, 452 F. Supp. at 568; and *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969).)

Weaver, *supra*, 970 F.2d at 1536 found a shortage of published opinions dealing with the validity of indemnification of a public employer for violations of employees' rights, and therefore, chose to rely on *Stamford*

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intentionally allow an employee's rights to be violated).) If the employer has "reason to believe that the fee was unlawful," and nonetheless agreed to collect it, the employer would be committing an unfair labor practice. (*North Bay*, *supra*, 905 F.2d at 479; *see also Helmsley-Spear, Inc. v. NLRB*, 275 NLRB 262, 268 (1985).) Public policy prohibits an employer from intentionally violating a nonmember employee's rights while relying on inherent or express protection for itself. Yet, when excess fees are deducted without knowledge of any wrongdoing, the employer is protected. (*See North Bay*, *supra*, 905 F.2d at 479; *see also Solo Cup Co. v. Federal Ins. Co.*, 619 F.2d 1178, 1187 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969); *Union Camp Corp. v. Continental Casualty Co.*, 452 F. Supp. 565, 568 (S.D. Ga. 1978) (likening indemnification to an insurance policy that would prohibit coverage when a claimant's intentional acts create the need for payment).) Prudent employers would guarantee the protection alluded to by the court by requiring that an express hold harmless provision be included in the final agreement.

Board of Education v. Stamford Education Association, 697 F.2d 70 (2d Cir. 1982) in reaching its decision. In *Stamford*, the Second Circuit held that public policy prohibited hold harmless provisions in collective bargaining agreements that were written to protect an employer from violations of federal statutorily detailed civil rights. (*Id.* at 73.) However, civil rights is vastly different from fair-share fees because, in both the Equal Pay Act and Title VII of the ~~Civil~~ Rights Act, Congress has provided a comprehensive statutory scheme that does not include contribution or indemnification. (*Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981).) The Supreme Court has explained that federal common law does not come into play when Congress has provided a "carefully considered legislative program" on a given subject matter. (*Id.*) However, Congress has not provided the same type of guidelines for dealing with hold harmless clauses pertaining to fair-share fees. When Congress has been silent on the issue, the Court has conceded that there is a "modern trend of federal court decisions favoring contribution" (*Id.* at 83) or the payment of a party's "share of the common liability." (*Id.* at 88.) More current cases take this even further, providing a foundation for the argument that federal common law may allow the union to hold an employer harmless for violations of a fair-share fee arrangement.[15] Therefore, contrary to the holding in *Weaver*, public policy should encourage rather than discourage the use of hold harmless provisions in labor agreements.

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[15] *See Hohe v. Casey, supra*, 956 F.2d 399 (holding that hold harmless provisions do not violate public policy); see also *Solo Cup Co. v. Federal Ins. Co., supra*, 619 F.2d 1178 (likening hold harmless clauses to insurance policies and finding the provisions not violative of public policy); and *Caplan v. Johnson, supra*, 414 F.2d 615 (holding that hold harmless clauses function as insurance policies which have been found not to violate public policy).

III. The Lower Courts Should Be Given A Further Opportunity to Resolve Any Apparent Conflict Between the Circuits on the Validity of Public Employer-Union Indemnification Agreements.

As respondents have shown (*ante*, pp. 9-13), there are matters not considered by the two circuits (i.e., the Second and Sixth) that have, without reaching the threshold issue of "standing," found the indemnity agreements in question to be void as against public policy. Consideration of these factors by future lower courts could (and should) produce different results. Moreover, no court has undertaken the kind of analysis suggested by the district court in this case, which borrows heavily from *Pierson v. Ray*, *supra*, 386 U.S. 547. That kind of analysis is warranted now that the district court has suggested it, and the circuits should be given an opportunity to develop these analyses and resolve any apparent differences between them as to the validity of public employer-union indemnification agreements. As the Court stated in *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180, 184 (1959):

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the . . . [issue in conflict among the circuits] can await a day when the issue is posed less abstractly.

CONCLUSION

For all the reasons aforementioned, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRED J. HIESTAND*
1121 L Street
Suite 404
Sacramento, CA 95814
(916) 448-5100

MICHAEL W. ROMAN
1816 Fifth Street
Berkeley CA 94710
(510) 548-6211

Attorneys for Respondents

* *Counsel of Record*

(3)

No. 99-519

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IN THE

Supreme Court of the United States

STEVEN PRESCOTT, ROBERT F. BERRY, CHERYL JONES,
KAREN PIERCE, AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO, KATHY LIBICKI, AND EL DORADO
COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
**Counsel of Record*

January 2000

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ARGUMENT

I. The Court Should Grant *Certiorari* Because There Is a Conflict Among the Courts of Appeals Concerning Nonmembers' Standing to Challenge the Validity of Provisions of Collective Bargaining Agreements Governing Their Terms and Conditions of Employment.

The first question presented in the Petition of Steven Prescott *et al.* ("the nonmembers") is whether public employees possess standing to challenge, as void as against federal constitutional law and public policy, the legality of one of the terms of the collective bargaining agreement ("CBA") governing their terms and conditions of employment. *See* Pet. at i, ¶ 1, 9-22.[1]

Respondents County of El Dorado ("County"), Kathy Libicki ("Libicki"), and El Dorado County Employees Association, Local No. 1 ("EDCEA"; collectively, "Respondents"), dispute virtually every particular of the Petition ("Pet."), asserting that the conflict between the Court of Appeals' decision below, Appendix ("App.") A at 15a-17a, and other circuits is illusory because the cases cited as "implicit standing" decisions neither "considered" nor "decided" standing. Furthermore, their Brief in Opposition ("Opp.") eludes the core question of the nonmembers' past and potential injuries.

As to the first point, Respondents miscast decisions contrary to their position. *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992), reversed a district court's explicit finding that nonmembers lacked standing to challenge one of their terms and conditions of employment, *id.* at 412, *reversing* 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), and ruled against nonmembers on the merits of their claim. However,

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[1] While Respondents state that "[t]he gravamen of the[nonmembers'] complaint is that ... the financial statement accompanying the notice was not properly *verified*," Opp. at 2, numerous other serious deficiencies were adjudicated by both courts. *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1085-91 (E.D. Cal. 1996); see also Pet. App. A at 14a and App. C at 33a.

Respondents recast *Hohe* as a decision that **affirmed** the district court's determination that the nonmembers suffered "no harm" by virtue of the indemnification clause, and therefore lacked standing, something that the Third Circuit failed to mention. Apparently recognizing the difference between their descriptions and reality, Respondents offer creative speculation as to why the Third Circuit reached the merits of the issue. Opp. at 10 fn. 4.

Respondents dismiss the remaining decisions striking down indemnification agreements,[2] asserting that, because they "do not explicitly mention or discuss standing.... [t]hey are not ... 'standing' decisions, and cannot be in conflict with the standing decisions in this case or with *Hohe*'s suggestion about 'standing.'" Opp. at 10 (footnote omitted), *citing* H. BLACK, LAW OF JUDICIAL PRECEDENTS 37 (1912). Respondents, therefore, disparage "any doctrine of 'implicit standing,'" as "the case law is silent." *Id.*

What Respondents fail to address in any fashion, however, is Article III's "case or controversy" requirement, and how "standing" to litigate a claim is "an indispensable part of the plaintiff's case." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). A contrary conclusion would call into question the validity of virtually every federal court decision which eschews specific discussion of the plaintiff's standing to sue. That is perhaps why Professor Black goes on to state:

> If the case could not have been decided as it was without the recognition and application of a given rule or principle of law, the decision is an authority for that rule or principle, although it may not have been expressly stated or mentioned by the court, but only tacitly assumed.

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[2] *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992), *cert. denied sub nom. Weaver v. Steger*, 507 U.S. 917 (1993); *Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990); *Jordan v. City of Bucyrus*, 754 F. Supp. 554, 558-59 (N.D. Ohio 1991).

BLACK, *supra* at 41 (1912).

Furthermore, as recognized by the court of appeals, App. A at 16a ("it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck"), the nonmembers' injury occurs upon **the public employer's taking** of agency fees absent compliance with "the constitutional requirements for the Union's collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 301, 310 (1986); *see also Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222 (1977) ("[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests"); **compare** App. C at 34a (sterilely describing the injury as "a violation of the standards enunciated in *Hudson*"). Respondents initially concede that the nonmembers' injury lies in the public employer's seizure of agency fees, Opp. at 5-6, but later attempt to resurrect the district court's misunderstanding of their injury, Opp. at 6, misidentifying the periods relevant to this case. *See* Pet. at 10-11 (discussing both "prospective declaratory relief" and "the uncontroverted fact that the public employer had done nothing to ensure that its employees' constitutional rights were not violated").

The nonmembers seek redress (*i.e.*, declaratory relief and damages) for past violations of their constitutional rights arising, in part, out of the existence of the indemnification provision, as a State's "statute, ordinance, regulation, custom, or usage," 42 U.S.C. § 1983 (West. Supp. 1999). That they seek **future** relief (*i.e.*, permanent injunctive relief) to prevent or diminish the possibility of future violations of their rights — "speculative" to some degree by definition — is all that is discussed by Respondents. Opp. at 6.[3]

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[3] To this end, Respondents discuss extra-record matters regarding their current conduct and preliminary rulings entered by the district court. Taken in the best possible light, this proves nothing more than that Respondents brought themselves into compliance with existing judicial mandate by stopping illegal

(continued...)

Respondents' argument that any potential for future injury is purely "speculative," Opp. at 6-7, is disingenuous. The continuing bargaining relationship (including a forced-unionism provision) between the County and EDCEA certainly renders the possibility of "harm" more than "speculative," particularly in light of the County's and Libicki's continuing fee seizures, Opp. at 6 & fn.2, **for nearly five months after** the Ninth Circuit declared EDCEA's notice and procedures inadequate under *Hudson*. App. A at 6a-10a, 12a-15a.

Indeed, the nonmembers clearly face the prospect of being "compelled to subsidize the public employer's defense against their meritorious lawsuit to vindicate their constitutional rights for violations that already have occurred," Pet. at 9-10. Respondents try to downplay this by claiming that the nonmembers "assume[] facts not yet in evidence." Opp. at 7. Respondents' complaints are two-fold: (1) that the nonmembers' argument improperly "assumes that the union's defense of the employer's liability ... is not properly 'chargeable,'" (Opp. at 7 & fn.3; *but see Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984) (organizing expenses are non-chargeable), and *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 519, 528 (1991) (chargeable activities must "not significantly add to the burdening of free speech that is inherent in the allowance of an agency or union shop"; "We have long recognized the important political and expressive nature of litigation"), *citing NAACP v. Button*, 371 U.S. 415, 431 (1963));[4] and (2) that EDCEA will, in fact, "charge petitioners for that defense." Opp. at 7.

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[3] (...continued)
fee deductions, and partially redressed past violations, nearly five months after the Ninth Circuit rendered its decision.

[4] *See also Ellis*, 466 U.S. at 452 n.13 ("it would be perverse to ... allow[] the union to charge to objecting nonmembers part of the costs of attempting to convince them to become members"). Is it any less perverse to allow a defendant to charge to successful plaintiffs the costs of their defense?

Respondents both miss and make the point. While failing to rebut the prospect that the nonmembers' **might** be charged for such expenditures, Respondents concede that EDCEA considers such expenditures to be chargeable to nonmembers. Opp. at 7-8. This reconfirms the "real and immediate threat that [the nonmembers] will be wronged again—a 'likelihood of substantial and immediate irreparable injury,'" *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983), *quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974) — that the nonmembers will again suffer injury adequate to confer upon them standing to challenge the provision under which they might be compelled to subsidize those union expenditures, *i.e.*, the indemnification provision challenged here. *Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982), *citing Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).[5] That the County/EDCEA bargaining relationship is continuing and imposes a forced-unionism obligation upon nonunion County employees is sufficient to constitute the "real and immediate threat" sufficient to sustain the nonmembers' standing. The record need not prove with certitude that EDCEA intends to use seized fees to underwrite the County's and Libicki's costs in defending against the nonmembers' meritorious lawsuit.

Respondents assert that the Ninth Circuit's decision "devastatingly dispel[s]" the notion that nonmembers suffer harm by virtue of an indemnification agreement and its negative effect upon the public employer's incentives to insure compliance with *Hudson*. Opp. at 11, *citing Weaver v. University of Cincinnati*, 764 F. Supp. 1241, 1247 (S.D. Ohio 1991), *aff'd in part*, 970 F.2d 1523 (6th Cir. 1992),

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[5] Respondents also miscast the substance of *Lehnert* as holding that there is no "injury" here. Opp. at 8. However, that *Lehnert* did not hold that preparations for an illegal strike were non-chargeable is not equivalent to a judgment by this Court that nonmembers fail to prove that they suffer injury from expenditures arising out of analogous facts. Broader application of this "reasoning" would turn virtually every case failing for proof of injury or where the merits of a plaintiffs' argument are rejected into a "standing" decision.

cert. denied sub nom Weaver v. Steger, 507 U.S. 917 (1993). The core of this argument appears to be the nonmembers' assumption that the indemnification agreement worked as designed and intended.

But like the Ninth Circuit (as well as the Third Circuit in *Hohe*), Respondents focus upon the purported incentives[6] possessed by the union to comply with *Hudson*'s requirements, incentives which proved insufficient to insure the union's compliance with *Hudson*'s requirements more than eight (8) years after the decision. Instead, the Ninth Circuit and Respondents change the subject, focusing on how indemnification of the public employer does not impede the nonmembers' recovery of costs and attorneys' fees under 42 U.S.C. § 1988, and the ruling that "the ultimate cost of any impropriety in the notice and the procedures ... belongs ... on the union." App. A at 16a; 177 F.3d 1102, 1112 (9th Cir. 1999).

However, this bold assertion not only finds no basis in any decision of this Court, it defies one of the core purposes for which the Civil Rights Act of 1871, 42 U.S.C. § 1983, was enacted, *i.e.*, to impose liability **on government** for the constitutional wrongs that it perpetrates, in order "to deter **state actors** from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (emphasis added), *citing Carey v. Piphus*, 435 U.S. 247, 254-57 (1978); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981).

What is lacking completely in Respondents' argument is recognition that an indemnification clause's primary purpose is to remove any impediments (*i.e.*, the prospect of suffering financial loss in an award of damages and/or attorneys' fees and costs, or defending against a lawsuit) to the public employer's acquiescence in the seizure of agency fees, a conclusion so self-evident and so discomfitting to the panel below that it dismissed it as "rank speculation," without greater explanation. Pet., App. A at 16a.

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[6] The prospect of expensive litigation and being denied a portion of the fee to which it was not entitled anyway, Pet., App. A at 17a, are two of the "incentives in a powerful form" which failed to deter EDCEA's conduct here.

This Court plainly held in *Hudson* that "the **government** and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" when they enter into and attempt to enforce a forced-unionism provision. *Hudson*, 475 U.S. at 307 n.20 (emphasis added). According to Respondents, this explicit statement of "government ... responsibility" "cannot logically be equated with" government's effort to evade that responsibility through an indemnification agreement, simply because a like clause was not at issue in *Hudson*. Opp. at 8. But *Hudson*'s explicit statement of "government ... responsibility" mandates that courts cast a skeptical eye toward government efforts to "place the ultimate cost of any impropriety in the notice and procedures ... on the union," App. A at 16a; 177 F.3d at 1112, even though it is the government which acts as the union's collection agent.

Because virtually every other case supports the nonmembers' claim of standing to challenge a term of the CBA governing their terms and conditions of employment, including the indemnification clause here, Respondents attempt to convert the Ninth Circuit's "ripeness" holding in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 814 (9th Cir. 1997), into a holding that nonmembers lack standing to challenge an indemnification clause. Opp. at 12-14. Inconveniently, though, a second holding on the issue (arising in a separate case, consolidated for decision), decided the merits of a challenge to an indemnification provision, albeit in the context of the nonmembers' challenge to the enforceability of the indemnification clause under the facts of the case. *Id.* at § IV(C). This portion of the decision cannot be reconciled with the notion that nonmembers lack standing to challenge indemnification provisions in CBAs governing their employment.

II. Private-Sector Bargaining Laws Have No Bearing Upon the Conflicts Among the Circuits in This Public-Sector Case Under 42 U.S.C. § 1983.

Trying to obscure the clear conflicts among the Circuits, Respondents detour into discussions of subjects of bargaining under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). Opp. at 14-16.

Respondents' digression begs the question, since the issue here is not whether EDCEA should have revealed its financial disclosure and procedures while bargaining for a forced-unionism agreement, as it was in those cases. Rather, since a public employer is required to review a union's notice and procedures for constitutional adequacy before taking "adverse action" against its employees by seizing agency fees from them, *Knight*, 131 F.3d at 817, the issue here is whether the union benefitting from those fee seizures may indemnify a public employer from liability when it fails to fulfill its duties. Thus, the Sixth Circuit in *Weaver*, 970 F.2d at 1536-38, did not discuss *North Bay Dev. Disabilities Servs., Inc. v. NLRB*, 905 F.2d 476 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991), because it was utterly irrelevant to the constitutional analysis applicable in *Weaver*.

Respondents' effort to convert this civil rights case into a duty of fair representation ("DFR") case must fail because of the substantially different context in which their construct arises (under the NLRA), as compared to this case under California law. Employees under the NLRA are not subjected to involuntary fee seizures, because the Act bars them, 29 U.S.C. § 186(c)(4), and their claims arise under the DFR, and § 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), *see Communications Workers of America v. Beck*, 487 U.S. 735, 742 (1988), not under the First and Fourteenth Amendments. Moreover, the powers and responsibilities of the government as a public employer certainly exceed those of private-sector employers in the marketplace. Thus, obscure and outdated decisions from other circuits which discuss the non-liability of private employers for DFR violations, *see* Opp. at 16, *citing Carroll v. Brotherhood of R.R.*

Trainmen, 417 F.2d 1025, 1028 (1st Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970), are of no aid to Respondents.

Furthermore, Respondents' fanciful and cataclysmic prophecies about the consequences of voiding indemnification clauses, Opp. at 17 & fns. 11 & 12, find no basis in fact or law. Moreover, they are better addressed in a brief on the merits, where Respondents might more properly discuss developments in the Sixth Circuit, where indemnification clauses were declared unlawful more than seven years ago, *Weaver*, 970 F.2d at 1536-38, rather than engage in flights of imagination. Instead, Respondents offer musings about "insurmountable burden[s]" of affirmative duties imposed upon public employers, ignoring that the other alternative is for a public employer to determine whether the union has complied with *Hudson*'s requirements and, if it has not, refuse to take "adverse action" against the nonunion employees. *Knight*, 131 F.3d at 817.

Equally implausible is the notion that indemnification here is "analogous in purpose" to an "insurance polic[y]." Opp. at 19. There is nothing "analogous" to the indemnification provision here with those at issue in cases regarding arms-length insurers, *Solo Cup Co. v. Federal Insurance Co.*, 619 F.2d 1178 (7th Cir.), *cert. denied*, 449 U.S. 1033 (1980); *Caplan v. Johnson*, 414 F.2d 615 (5th Cir. 1969), since those "insurers" did not profit from the insured's allegedly unlawful conduct.

III. Further Consideration by the Lower Courts Is Unnecessary, Particularly Where, as Here, the Decision for Which Review Is Sought Is Far Outside the Mainstream of Existing Relevant Decisionmaking.

Respondents also claim that the second question presented — on the legality of the indemnification clause — requires further "percolation" in the lower federal courts, raising various "subtle and difficult issues" cited by the district court in its effort to avoid addressing the question. Opp. at 3, 21. Tellingly, those "subtle and difficult issues" were unworthy of the Ninth Circuit's comment.

Certainly, no other courts have expressed concern over the issues raised by the district court, Opp. at 3, *citing* App. C at 33a, when they adjudicated the constitutional validity of such indemnification clauses. Such "concerns" are irrelevant to the nonmembers' claim, and should not hinder this effort to obtain review.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

W. JAMES YOUNG*
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

ATTORNEY FOR PETITIONERS
*Counsel of Record

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